G. Brit. Courts 16

The Fifth PART of the

REPORTS

OF

Sir *Edward Coke* Kt.

Her Majesty's ATTORNEY GENERAL.

OF

Divers Resolutions and Judgments given with great Deliberation, by the Reverend Judges and Sages of the Law, of Cases and Matters in Law which were never resolved or adjudged before: And the Reasons and Causes of the said Resolutions and Judgments, during the most happy Reign of the most Illustrious and Renowned Queen *ELIZABETH*, the Fountain of all JUSTICE and the LIFE of the LAW.

With REFERENCES to all the BOOKS of the *COMMON LAW*, as well Antient as Modern.

Quid enim laboro, nisi ut veritas in omni quæstione explicetur; verum dicentibus facile cedam. TUL. Tusc. quæst. lib. 3.

In the *SAVOY*:

Printed by E. and R. NUTT, and R. GOSLING, (Assigns of *Edw. Sayer* Esq;) for D. Browne, J. Walthoe, B. Lintot, R. Gosling, W. Mears, T. Ward, W. Innys, J. Osborn, T. Woodward, F. Clay, T. Wotton, R. Williamson and A. Ward.

M. DCC. XXVII.

UK Sol Cok

JUN 4 1909

TO THE

READER.

VERE dicitur (candide Lector) quod *Error* (cui *ignorantia* gemella eſt individua) in progreſſu adeo infinite ſe multiplicat, tam prodigioſas & novas Chimæras procreat, tanta & tam multiplici incertitudine fluctuat, & ejuſmodi venenum ex virulento *ignorantiæ* halitu imbibit, ut ſingulos quibus aliquid ſui venenati halitus infundit, peſtifera contagione inficiat ſeu contaminet; Quodque mirandum eſt, priuſquam ad terminum perveniat, ad miſerum & immaturum exitum (niſi prævertatur) confuſione

IT *is truly ſaid* (good Reader) *that* Error (Ignorance *being her inſeparable Twin*) *doth in her Proceeding ſo infinitely multiply her ſelf, produceth ſuch monſtrous and ſtrange Chimæra's, floateth in ſuch and ſo many Incertainties, and ſucketh down ſuch Poiſon from the contagious Breath of Ignorance, as all ſuch into whom ſhe infuſeth any of her poiſoned Breath, ſhe dangerouſly infects or intoxicates; And that which is wonderful before ſhe can come to any End, ſhe bringeth all Things* (*if ſhe be not prevented*) *by Confuſion to a miſerable and untimely*

Pref. to *Parſons* Anſwer.

End; Naturalia & vera artificialia ſunt finita, nullus terminus falſo, error immenſus. *On the other Side, Truth cannot be ſupported or defended by any Thing but by Truth her ſelf, and is of that Conſtitution and Conſtancy, as ſhe cannot at any Time, or in any Part or Point be diſagreeable to her ſelf; ſhe hateth all Bombaſting and Sophiſtication, and bringeth with her Certainty, Unity, Simplicity, and Peace at the laſt*; Putida ſalſamenta amant origanum, *Veritas* per ſe placet, honeſta per ſe decent, falſa fucis, turpia phaleris indigent. *Ignorance is ſo far from excuſing or extenuating the Error of him that had Power to find out the Truth (which neceſſarily he ought to know) and wanted only Will to ſeek it, as ſhe will be a juſt Cauſe of his great Puniſhment*: Quod ſcire debes & non vis, non pro ignorantia ſed pro contemptu haberi debet. *Error and Falſhood are of that Condition, as without any Reſiſtance they will in Time of themſelves fade and fall away: But ſuch is the State of Truth, that though many do impugn her, yet will ſhe of her ſelf* quadam abripit; *Naturalia & vera artificialia ſunt finita, nullus terminus falſo*, Error *immenſus*. Contra vero *Veritas* ſuſtentari & oppugnari niſi ipſa veritate minime poteſt, & ea eſt ejus natura & conſtantia, ut nullo tempore nulla parte ſibi a ſe diſſentiat, mangonio & phaleris exornari odit, comiteſque ſecum ducit *Unitatem, Simplicitatem*, & *Pacem* tandem: *Putida ſalſamenta amant origanum*, Veritas *per ſe placet, honeſta per ſe decent, falſa fucis, turpia phaleris indigent*. Tantum abeſt, ut *ignorantia* excuſet aut extenuet ejus errorem qui *Veritatem* invenire poterat (quam neceſſario agnoſcere debeat,) & tantum inveſtigare noluit, ut in cauſa ſit cur gravius plectatur; *Quod ſcire debes & non vis, non pro ignorantia ſed pro contemptu haberi debet*. Erroris & falſitatis ea eſt natura, ut nemine repugnante ſenſim per ſe dilabantur & evaneſcant: Ea autem veritatis natura, ut quamvis plurimi oppugnent, ipſa tamen demum vincat & ut Palma efflo-

reſcat;

reſcat; Ad tempus forſitan vi quadam prematur, ſed nullo tempore ulla ratione opprimatur. Nullus eſt hujus Reipublicæ Civis, qui illuſtribus documentis & perſpicuis indiciis de ſuo patrimonio & jure avito & certiſſimo vere edoctus (quamvis aliquantiſper ignorantia, falſa perſuaſione, aut inani timore deceptus fuerit, & poſſeſſione deturbatus) ſed Juris prudentes ad eam recuperandam conſulet: Antiquæ & præcellentes Angliæ Leges ſunt avita jura & antiquiſſima optimaque hæreditas quæ cives hujus Regni habent; Per illas etenim non ſolum hæreditate & bonis in pace & tranquilitate, ſed etiam vita & patria chariſſima ſecure gaudent. Cum autem male metuo ne ex chariſſimis concivibus permulti (& ex illis quamplurimi præſtanti ingenio, ſingulari ſolertia, & eximiis animi dotibus) quia illuſtria quæ habent indicia minus intelligunt, jus etiam avitum in nonnullis maximi momenti rebus minus vere cognoſcant; In primo limine hujus Quinti operis mei illos direxi &

ever prevail in the End, and flouriſh like the Palm-Tree; ſhe may peradventure by Force for a Time be trodden down, but never by any Means whatſoever can ſhe be trodden out. There is no Subject of this Realm, but being truly inſtructed by good and plain Evidence of his ancient and undoubted Patrimony and Birth-right, (tho' he hath for ſome Time by Ignorance, falſe Perſuaſion, or vain Fear, been deceived or diſpoſſeſſed) but will conſult with learned and faithful Counſellors for the Recovery of the ſame: The antient and excellent Laws of England *are the Birth-right, and the moſt ancient and beſt Inheritance that the Subjects of this Realm have, for by them he injoyeth not only his Inheritance and Goods in Peace and Quietneſs, but his Life and his moſt dear Country in Safety. And for that I fear that many of my dear Countrymen, (and moſt of them of great Capacity, and excellent Parts) for want of underſtanding of their own Evidence, do want the true Knowledge of their ancient Birth-right in ſome Points of greateſt Importance; I have in the Beginning of this my fifth Work, directed them to thoſe that*

will not only faithfully counſel, and fully reſolve therein, (ſuch as cannot be daunted with any Fear, moved by any Affection, nor corrupted with any Reward,) but alſo eſtabliſh and ſettle them in quiet and lawful Poſſeſſion. Upon juſt Grounds to rectify an Error in a Man's own Mind is a Work of a clear Underſtanding, and of a reformed Will, and frequent with ſuch as be good Men, and have ſober and ſettled Wits. The End of ſuch as write concerning any Matter, which by ſome for want of Inſtruction is called into Controverſy, ſhould be, with all the Candor and Charity that can be uſed, to perſuade and reſolve by demonſtrative Proofs the diligent Reader in the Truth. But now a Days thoſe that write of ſuch Matters do for the moſt Part by their bitter and uncharitable Invectives, tranſported with Paſſion and Fury, either beget new Controverſies, or do as much as in them lie to make the former immortal. Certain it is, that ſome Books of that Argument, that have had Truth for their Center, yet becauſe they have wanted Temperance, Modeſty and Ur-

quaſi manu duxi, ad eos qui non tantum ſano conſilio aderunt, & cumulate ſatisfacient (nec enim vel timore frangi, vel affectione moveri, vel præmio corrumpi poſſunt) verum etiam in tranquilla & juſta poſſeſſione ſtabilient & confirmabunt: Errorem ex animo ſolidis argumentis extorquere intellectus eſt acerrimi, animi integri, viriſque probis, ſobriis, & ſanis non eſt inſolens. Hoc iis propoſitum eſſet qui de re aliqua ſcribunt, quæ inter alios controvertitur quia non ſunt informati, ut omni quo poſſunt candore & charitate ſtudioſum Lectorem certiſmis argumentis perſuadeant & edoceant. Sed ut nunc ſunt tempora, qui de ejuſmodi rebus ſcribunt animi impetu abrepti, acerbis & contumelioſis convitiis aut novas controverſias ſuſcitant, aut quantum in illis eſt priores reddunt immortales: Certo certius eſt nonnullos ejus generis libros quibus veritas ipſa centrum fuerat, nihilominus quia in peripheria temperantia, modeſtia & urbanitas non aderant,

rant, in veritatis præjudicium adverſarios in erroribus obfirmaſſe ſuis; & conviciis amarulentis non ſolum exacuerunt eos ut ſe ipſos defenderent, & defendendo ſimiliter impingerent, verumetiam ſæpenumero (indead ſcribendum adacti) errorem ipſum in multorum fraudem propugnarent, qui aljas nemine contradicente in auras abiiſſet. Qui contra conſcientiam veritatem cognitam oppugnat, id facit aut ſui ipſius aut aliorum gratia; ſui ipſius, eo quod animo ſit male contento: Aliorum, quibus ob aliam rationem placere ſtudet: Male ille contentus, quia quo ambitioſa & injuſta cupiditas traxit non pervenerit, aut quia in luce Reipublicæ, ob pravitatem vel flagitia, pœnam merito ſubierit, aut gratia exciderit, ac igitur tempori adverſo æſtu obluctatur ut aliis placeret, eo quod ex eorum favore & benevolentia, ejus æſtimatio & victus dependet. Non me latet, quod hoc tempore omnia Regna & Reſpublicæ Legibus adminiſtrantur, quodque ſua cujuſque nationis peculi-

banity for their Circumference, have to the great Prejudice of the Truth hardened the Adverſaries in their Errors; and by their bitter Invectives, whetted them not only to defend themſelves, and to offend in the like, but many Times (being thereby urged to write) to defend the Error it ſelf to the Hurt of many, which otherwiſe might have vaniſhed away without any Contradiction. He that againſt his Conſcience doth impugn a known Truth, doth it either in reſpect of himſelf, or of others; of himſelf, in that he hath within him a diſcontented Heart; of others, whom for certain worldly Reſpects he ſeeketh to pleaſe: Diſcontented he is, either becauſe he hath not attained to his ambitious and unjuſt Deſires, or for that in the Eye of the State, he for his Vices or Wickedneſs, hath juſtly deſerved Puniſhment and Diſgrace, and therefore doth oppoſe himſelf againſt the Current of the preſent to pleaſe others, in Reſpect that his Credit or Maintenance dependeth upon their Favour or Benevolence. I know that at this Day all Kingdoms and States are governed by Laws, and that the particular and approved

approved Custom of every Nation is the most usual binding and assured Law; I deal only with the municipal Laws of England, *which I profess, and whereof I have been a Student above these thirty-five Years: My only End and Desire is, that such as are desirous to see and know (as who will not desire to see and know his own?) may be instructed: Such as have been taught amiss (every Man believing as he hath been taught) may see and satisfy himself with the Truth, and such as know and hold the Truth (by having so ready and easy a Way to the Fountains themselves) may be comforted and confirmed.*

aris & approbata consuetudo, usitatissimum est vinculum, & Lex firmissima; Mihi res est cum Municipalibus Angliæ Legibus quas profiteor, & quibus jam triginta quinque annos invigilavi: Hoc mihi solummodo propositum, & in votis est, ut qui expectant perspicere & cognoscere (Quis enim quæ sua sunt videre & recognoscere non expetit?) edoceantur, qui male fuerint edocti (Quisque enim credit ut est edoctus,) veritatem perspiciant & in ea acquiescant, qui autem veritatem perspiciunt & tuentur, (cum tam facilis via ad ipsos fontes pateat) cum solatio confirmentur.

Vale.

Parsons Answ. fol. 19.

Multa Ignoramus quæ non laterent, si Veterum lectio nobis esset familiaris. Macrob. lib. 6. Satur.

De

De Jure Regis Eccleſiaſtico.

Caſus CAUDREY.

TErmino Hillarii, anno 33 regni Elizabethæ Rotulo 340 *Robertus Caudrey* Clericus ... jus vocavit *Georgium Atton* de actione tranſgreſſionis, quod Clauſum ſuum ad Northluffenham in Comit' Rutlandiæ perfregiſſet ... ie ſeptimo Auguſti, anno ...gni prædictæ Reginæ tri...ſimo primo: Defendens ...ſpondit ſe minimè eſſe ...um; juratores evocati & ...rati, veredictum dederunt ...eciale, videlicet rem eſſe ...eram comperuerunt, de ju... autem ad judicium cu... referentes in hanc ſen...entiam, comperuerunt que...ntem ante tranſgreſſionem ...iſſe rectorem rectoriæ de ...outhluffenham in Comi...tu prædicto, & locum in ...uo damnum fuit illatum, ...ſſe partem ejuſdem Recto...æ comperuerunt item ſta...tum factum anno ejuſ...em Reginæ primo, quo ...ncitum in hanc ſenten...iam fuit. Quod ea Ecleſiaſtica juriſdictio, quæ a...iqua poteſtate Spirituali, vel

Of the King's Eccleſiaſtical Law.

CAUDREY's *Caſe*.

IN the Term of St. Hillary, in the 33d Year of the Reign of Q. Elizabeth, Rotulo 340, Robert Caudrey Clark brought an Action of Treſpaſs againſt George Atton, for breaking of his Cloſe at Northluffenham in the County of Rutland, the 7th Day of Auguſt, in the 31ſt Year of the Reign of the ſaid late Queen: The Defendant pleaded not guilty, and the Jury returned and ſworn for Trial of this Iſſue, gave a ſpecial Verdict, that is, they found the Truth of the Caſe at large, referring the ſame for the Law to the Judgment of the Court, to this Effect: They found that the Plaintiff before the Treſpaſs ſuppoſed to be done, was Parſon of the Rectory of Southluffenham, in the County aforeſaid, whereof the Place wherein the Treſpaſs is alledged was Parcel, and found the Statute made in the* firſt Year of the ſaid late Queen's Reign by which in effect it is enacted, that ſuch Juriſdiction Eccleſiaſtical, as by any Spiritual or Eccleſiaſtical

Poph. 59. 3 Inſt. 198. Moor 228.

* 1 Eliz. c. 1. 16 & 17 Car. c. 11. Cawly 1, 2, 3, &c. 4 Inſt. 324, 325. Cr. Jac. 37. Moor 755. Parſon's Anſwer 57.

ſtical Power hath heretofore been, or may lawfully be exerciſed for the Viſitation of the Eccleſiaſtical Eſtate and Perſons, and for Reformation, Order, and Correction of the ſame, and of all Manner of Errors, Hereſies, Schiſms, Abuſes, Offences Contempts and Enormities, within this Realm, ſhould for ever be united and annexed to the Imperial Crown of this Realm. And that her Highneſs, her Heirs and Succeſſors, ſhould have full Power and Authority by Virtue of that Act by Letters Patents under the Great Seal of England, to aſſign, nominate and authoriſe ſuch Perſons, being natural born Subjects, as her Highn. her Heirs or Succeſſ. ſhould think meet, to exerciſe and execute under her Highneſs, her Heirs and Succeſſors, all and all Manner of Juriſdiction, Privileges and Preheminences in any wiſe touching or concerning any Spiritual or Eccleſiaſtical Juriſdiction within this Realm of England and Ireland, and to viſit, reform, redreſs, order, correct, and amend all ſuch Errors, Hereſies, Schiſms, Abuſes, Offences, Contempts, and Enormities whatſoever, which by any Manner Spiritual or Eccleſiaſtical Power, Authority or Juriſdiction can or may lawfully be reformed, ordered, redreſſed, corrected, reſtrained or amended to

Eccleſiaſtica jam ant' exercebat', vel legitimè exerceri poterat ad viſitand' Eccleſiaſticum ſtatum & ordinem, item ad reformandum, in ordinem redigendum, & corrigendum homines Eccleſiaſticos, omnimodos errores, hæreſes, ſchiſmata, abuſus, offenſas & enormitates intra hoc regnum, imperiali hujus Regni diademati in perpetuum uniretur & adjungeretur. Et quod ejuſdem Reginæ celſitudo, hæredes & ſucceſſores, virtute hujus ſtatuti, plenam poteſtatem & auctoritatem haberent, per literas patentes ſub magno Angliæ ſigillo, aſſignandi, nominandi, & authoritate muniendi ejuſmodi perſonas, nativos hujus regni ſubditos, quos ſua celſitudo, hæredes & Succeſſores idoneos exiſtimarent, ad exercendum & exequendum ſub ſua celſitudine, hæredibus & ſucceſſoribus omnimodam juriſdictionem, privilegia, præheminentias, ullo modo ſpectantes ad juriſdictionem Spiritual' vel Eccleſiaſticam infra hoc regnum Angliæ & Hiberniæ, & ad viſitandum, reformandum, componendum, corrigend' & emendand' omnes ejuſm' errores, hæreſes, ſchiſmata, abuſus, offenſas, contemptus, & enormitates quaſcunq; quæulla poteſtate ſpirituali vel eccleſiaſtica poteſtate

ſtate, authoritate, aut juriſdictione legitimè reformari, componi, corrigi, coerceri, vel emendari poſſint, ad omnipotentis Dei beneplacitum, virtutis incrementum, & pacis unitatiſq; hujus regni conſervationem. Et quod etiam ejuſmodi perſonæ ita nominatæ, aſſignatæ, & authoritate munitæ, virtute Stat. & ejuſm' literarum Patent' plenam poteſtat' & authoritat' haberent ſub ſua Celſitudine hæredib' & Succeſſoribus ad omnia præmiſſa exercenda, utenda, & exequenda juxta tenor' præd' Literar' Patentium, ulla re, vel cauſa in contrarium non obſtante. Poſtea autem præfata Reg' per literas Patentes ſub magno Angl' ſigillo datas nono die Decembris anno regni ſui viceſim' ſexto juxta tenor præd' ſtatuti Archiepiſcopo Cantuarienſi, Epiſc' Londinenſi, & quibuſd' aliis, vel eor' tribus aut plurib' authoritat' dedit inquirendi ad ſtatut. anni primi regni ſui de libro prec' publicar', cum hac etiam clauſula in iiſd' Literis Patentibus comprehenſa, viz. Præterea, plen' poteſtatem & authoritatem damus & concedimus reformandi, ordinandi, corrigendi, emendandi in ſingulis hujus Regni locis, omnes errores, hæreſes, ſchiſmat', abuſus, contemptus, enormitat' ſpiritu-

the Pleaſure of Almighty God, the Encreaſe of Virtue, and the Conſervation of the Peace, and Unity of this Realm. And that ſuch Perſons ſo to be named, aſſigned, and authoriſed, ſhould have full Power and Authority by Virtue of that Act, and of ſuch Letters Patents, under her Highneſs, her Heirs and Succeſſors, to exerciſe, uſe or execute all the Premiſſes, according to the Tenor and Effect of the ſaid Letters Patents, any Matter or Cauſe to the contrary notwithſtanding. And afterwards the ſaid Queen by her Letters Patents under the Great Seal of England, bearing Date the ninth Day of December, in the ſix and twentieth Year of her Reign, according to the Tenor of the ſaid Act, did authoriſe the Archbiſhop of Canterbury, the Biſhop of London, and divers others, or any three or more of them, to inquire amongſt others, of the Statute of the firſt Year of her Reign, concerning the Book of Common Prayer, with this Clauſe alſo contained in the ſaid Letters Patents, videlicet, Alſo we give and grant full Power and Authority to reform, redreſs, order, correct and amend in all Places of this Realm, all Errors, Hereſies, Schiſms, Abuſes, Contempts, and Enormities, Spiritual or Eccleſiaſtical whatſoever, which by any

Spiritual or Ecclesiastical Power and Authority or Jurisdiction, can or may lawfully be reformed, ordered, redressed, corrected, restrained or amended by the Censures Ecclesiastical, Deprivation, or otherwise, &c. And upon Proof thereof had, and the Offences aforesaid, or any of them sufficiently proved against any Person or Persons, by Confession, lawful Witness, or by any due Manner, &c. That then you or three of you shall have full Power and Authority to order and award such Punishment to every such Offender by Fine, Imprisonment, Censure of the Church, or otherwise, or by all or any the said Ways, and to take such Order for the Redress of the same, as by your Wisdoms and Discretions shall be thought meet and convenient, as by the said Letters Patents more at large appeareth. And further they found the Statute of the first Year of the Reign of the said late Queen, by which it is enacted; That the Offender against that Act concerning the Uniformity of Common Prayer, and being thereof lawfully convicted, according to the Laws of the Realm, by Verdict of twelve Men, or by his Confession, or by the notorious Evidence of the Fact, should forfeit for the first Offence the Value of his Spiritual Living for one whole Year, and should suffer six Months

ales vel Ecclesiasticas quascunque, quæ aliqua authoritate, vel jurisdictione Spirituali vel Ecclesiastica, reformari, ordinari, corrigi, coerceri, vel emendari, legitimè possint censuris Ecclesiasticis, deprivatione, vel alias, &c. Cumque hæc & offensæ prædictæ, aut earum aliqua contra ullam personam aut personas, confessione, legitimo testimonio, aut quavis debita forma sufficienter probent', &c. Quod tunc vos vel tres ex vobis plenam potestatem & auctoritatem habebitis in ordin' redigendi, & pœnas infligendi singulis sic delinquentibus, mulcta, incarceratione, censura Ecclesiastica, vel aliàs, vel illis omnibus, & singulis, & ad eorum reformationem eam rationem ineundi, quæ vestra prudentia æquum & bonum videbitur, ut ex iisd' literis Patentib' plenius patet. Ad hæc comperuerunt Statut. anni primi regni ejusd' Reginæ, quo sancitum est, quod qui offenderit contra Statutum de precum publicarum uniformitate, & legitimè juxta leges regni duodecim virorum veredicto convictus, vel sua ipsius confessione, vel perspicua facti evidentia, prima vice amitteret emolumenta beneficior' Ecclesiasticor' quæ habuit, & sex totos menses incarceretur

tur. Si secunda vice deliquerit, postquam convictus fuerit, *ipso facto* omnibus Spiritualibus promotionibus deprivaretur. Tertia autem vice si deliquerit post duas convictiones, ut prædicitur, omnibus Ecclesiasticis promotionibus deprivatus ad vitam incarceretur. Et quod præfatus *Robertus Caudrey* ante tempus transgressionis præsuppositæ prædicta rectoria seu beneficio coram Commissariis prædictis privatus fuerit, tum quod contra precum publicarum librum concionatus sit, tum quod rem divinam juxta præscriptum ejusdem libri celebrare recusaverit, & in quibus sigillatim ostensum erat: Quæ deprivationis sententia per Episcopum Londinensem, cum assensu A. B. C. D. collegarum suorum lata. Jurati autem veredictum suum concluserunt: Quod si prædicta deprivatio non legitima esset, sed irrita, tunc defendentem transgressionis reum invenerunt. Sin autem deprivatio illa irrita non erat, tunc defendentem non reum invenerunt. Et hæc causa pro Tribunali per Advocatos utriusque partis, & de Tribunali per Judices sæpius tractata est, & post magnam & maturam deliberationem, & cum cæteris Judicibus consultationem, Termino Hillarii anno ejusdem

Imprisonment. For the second Offence to be committed after such Conviction, he should be deprived ipso facto, of all his Spiritual Livings. And for the third Offence to be committed after ii. Convictions as is aforesaid, he should be deprived of all his Ecclesiastical Livings, and be imprisoned during his Life. And that the said Robert Caudrey before the Time of the Trespass supposed, was deprived of his said Benefice before the said high Commissioners, as well for that he had preached against the said Book of Common Prayer, as also for that he refused to celebrate Divine Service according to the said Book, and shewed particularly wherein: Which said Sentence of Deprivation was given by the Bishop of (a) London, cum assensu A. B. C. D. &c. collegarum suorum. And the Jury concluded their Verdict; That if the said Deprivation were not warranted by Law, but void, then they found the Defendant guilty of the Trespass: And if the Deprivation were not void in Law, Then they found the Defendant not guilty. And this Case was solemnly and oftentimes debated at Bar by the Counsel of either Party, and at the Bench by the Judges, and after great and long Deliberation and Consultation had with the Rest of the Judges, was in the Term of S. Hilary in the 37. Year of

(a) Poph. 59. post. 4.

The Objections of the Counsel of the Plaintiff.

1.

the said Queen adjudged. And it was argued by the Counsel of the Plaintiff, that the said Deprivation was void for 4 Causes. First, the said Book of Common Prayer being authorised and commanded to be observed by the said Act of the first Year of the Queen, upon the Forfeitures and Punishments therein comprised, the Offence of the Plaintiff is against that Act: for that Act only doth command the Observation of the said Book and inflicteth Punishments in several Degrees for depraving or not observing of the same, and consequently if the Offence be against that Act, the Plaintiff ought to have been proceeded withal, and punished according to the same: And it was said, that the said Act was an Act of great Moderation and Equity, for the Offender for the first Offence, should not be ipso facto, deprived, but should only loose the Profits of his Ecclesiastical Livings for one Year, and suffer Imprisonment for six Months, to the End that such as were forward might have a Time to repent, and the well minded a Time to consent; and such Care had the Act of the Offenders in this Behalf, as if they committed one Offence, and then another, and after the second many more: yet should not the Offender be deprived for any of the later Offences, unless he had been first judicially convicted of Record

Reginæ 37 adjudicata fuit. Per Advocatos querentis argumentatum est, deprivationem quatuor de causis esse irritam. *Primum*, cum sancitum esset, & scitum, ut liber ille publicarum precum statuto illo anni primi Reginæ observaretur sub mulctis & pœnis ibidem comprehensis, & querens peccavit contra illud statutum: Statutum etenim illud observationem tantummodo illius libri imperat, pœnamque infligit diversis gradibus pro eodem depravato vel non observato, & consequentèr si violatum fit statutum, querens juxta statutum tractandus & plectendus erat: Dictum insuper erat, statutum illud fuisse admodum moderatum & æquum, nam delinquens pro primo delicto non erat *ipso facto* deprivandus, sed tantum emolumenta Ecclesiasticorum suorum beneficiorum ad unum annum amitteret, & ad sex totos menses incarceretur, ut pervicaces spatium resipiscendi & moderatiores tempus ad consentiendum haberent: eamq; delinquentium rationem statutum illud habuit, ut si quis primo, secundo vel tertio deliquerit, non tamen deprivaretur, pro posterioribus delictis, priusquam judicialiter convictus fuisset ex recordo per duode-

duodecim virorum veredictum, vel ſui ipſius confeſſione, vel perſpicua facti evidentia: Ità ut ſecundum delictum pro quo deprivandus ſit ex illo ſtatuto, committendum eſt poſt ejuſmodi judicialem & ſolemnem convictionem & pœnam juxta ſtatutum: Si ejuſmodi publica pœna & inflictio non intellectum daret, & cor ad reſipiſcendum non apperiret, tunc poſt ejuſmodi convictionem pro ſecundo delicto incarcerandus, & poſt ejuſmodi convictionem deprivandus. Quod ſi in hac cauſa *Caudrey* querens beneficio illo Eccleſiaſtico, ſive rectoria de *Southluffenham* pro primo delicto deprivatus erat, cùm nunquam antèa in queſtionem vocatus aut convictus fuiſſet pro ejuſmodi delicto. Concluſum igitur erat pro hac prima parte, quod ſupremi illi commiſſarii formam & ordinem ſtatuto preſcriptum non obſervarunt: *Et non obſervata forma infertur adnullatio actus*, & ex conſequentia deprivatio eſt irrita, ideoque ſententia pro eo ferenda. Allegatum etiam erat per Querentis advocatos per anticipationem quod etiamſi in eodem ſtatuto erat *Proviſo*, pro Archiepiſcopis, Epiſcopis, eor' Cancellariis, Commiſſariis, Archidiaconis, & aliis Ordinar' peculiarem ju-

by Verdict of xii. Men, or by Confeſſion, or notorious Evidence of the Fact: So as the ſecond Offence for which he muſt be deprived by the ſaid Act, muſt be done and committed after ſuch a judicial and ſolemn Conviction and Puniſhment according to the ſaid Act: And then if ſuch an open Puniſhment and Infliction ſhould not give him Underſtanding, and open his Heart to repent: Then upon a like Conviction for a ſecond Offence, to be committed after ſuch a Conviction, Deprivation ſhould follow. But in the Caſe now in Queſtion, Caudrey the Plaintiff was deprived from his ſaid Parſonage of Southluffen' for his ſaid firſt Offence, being never convented or convicted for any ſuch Offence before. And therefore it was concluded for this firſt Point, That the ſaid high Commiſſioners had not purſued the Form and Order preſcribed by the ſaid Act; Et non obſervata forma, infertur adnullatio Actus, and conſequently the Deprivation of the Plaintiff is void, and therefore Judgment ought to be given for him. And it was ſaid by the Plaintiff's Counſel, by Way of Anticipation, That albeit there was a Proviſo in the ſame Act for Archbiſhops, Biſhops, and their Chancellors, Commiſſaries, Archdeacons, and other Ordinaries, having peculiar Juriſdiction,

yet that did not give any Strength to the ſaid Deprivation for two Cauſes. Firſt, that the Commiſſioners by Force of the ſaid Act of 1 Eliz. and of ſaid Letters Patents, are not within the ſaid Proviſo, but only Archbiſhops and Biſhops, their Chancellors, Commiſſaries, &c. in reſpect of their ordinary Juriſdiction. 2. Admitting it ſhould extend to the ſaid high Commiſſioners, yet ought they to proceed according to the Form and Order of the ſaid Act, for an Offence done againſt that Act. Secondly, it was objected by the Counſel of the Plaintiff, that Caudrey the Plaintiff was not deprived either by the Verdict of xii. Men, or by Confeſſion, or by the notorious Evidence of the Fact, but by Default in reſpect he appeared not, being duly precognizated or warned, which Caſe, as it was objected, was (*a*) Caſus omiſſus, & oblivioni datus, and not within the ſaid Act. Thirdly, It was objected on the Behalf of the Plaintiff; That the ſaid Sentence given by the ſaid high Commiſſioners was utterly void, for that they or any three or more of them having Authority by Force of the ſaid Act, and of the ſaid Letters Patents under the Great Seal, ought to join in the Sentence, and that one alone with the (*b*) Conſent of two or more of the other Commiſſioners cannot give a Sentence, for that every Commiſſo-

2.

3.

(*a*) 5 Co. 2. Pr. 37. b.

(*b*) Roph. 59. Antea 3. a. Poſtea. 7. a.

riſdictionem exercentibus, nullam tamen vim præd' deprivationi dedit, idque duabus de cauſis: *Primum*, quod prædicti commiſſarii virtute ſtatuti anni primi Elizabethæ, & prædictarum literarum Patentium in iſto Proviſo non comprehenduntur, ſed ſolummodo Archiepiſcopi, Epiſcopi, eorum Cancellarii, & Commiſſarii, &c. ratione juriſdictionis eorum ordinariæ. *Secundo*, ſi modo detur quod ad ſupremos Commiſſarios extenderit, illi tamen juxta formam & ordinem ſtatuti pro delicto contra ſtatutum procederent. *Secundo*, per advocatos querentis, quod *Caudrey* non deprivatus erat vel duodecim virorum veredicto, vel confeſſione, vel perſpicua facti evidentia. ſed quod citatus, & admonitus non comparuerit, quod, ut illi objecerunt, *Caſus erat omiſſus, & oblivioni datus*, & non ſtatuto puniendus. *Tertio*, ex parte querentis objectum erat ſententiam à primis illis Commiſariis latam omnino eſſe irritam, quod illi vel tres, aut plures illorum authoritatem habentes ex illo ſtatuto, & literis illis Patentibus ſub magno ſigillo, debent junctim ſententiam ferre, & quod unus ſolus cum conſenſu duorum aut plurium Commiſſariorum ſententiam ferre non poſſit, quia ſinguli æqualem

lem habent authoritatem, & per eaſd' literas Patentes tres vel plures ſententiam ferre debent cum aliorum conſenſu, & quod ejuſmodi ſententia lata per Comiſſarios ad audiendum, & determinandum, vel per alios Commiſſarios aut Judices legis communis omnino erat irrita. *Quarto*, & poſtremo objectum erat, quod prædicti Commiſſarii non erant juxta ſtatutum illud nominati, & conſtituti: Juriſdictio enim, & poteſtas coronæ per illud ſtatutum data eſt ejuſmodi Commiſſariis qui ſunt naturales & nativi ſubditi, & ex ſpeciali illo veredicto non conſtat, quod Commiſſarii illi fuerunt naturales & nativi ſubditi; & quamvis Judices ut viri privati in particulari ſcientia illos naturales & nativos ſubditos cognoſcerent, cum tamen Judices ex recordo exiſterent judicialibus tantum oculis intueri, & nihil aliud cognoſcere, quam quod in recordo illis apparet, nam ex illo non ex privata ſcientia ſine recordo ſententiam ferre debent, & ex illo record' judicium ſuum in record' inſcribere. Et quandoquidem Regina prædict' (ut à Conſiliariis querentis dictum erat) Eccleſiaſticam juriſdictionem ex illo ſtatuto parliamentario haberet & ex cod' poteſtas ipſi data eſſet

ner hath equal Authority, and by the ſaid Letters Patents three or more muſt give the Sentence with Conſent of others, and ſuch a Judgment given by any Commiſſioners of Oyer or Terminer, or other Commiſſioners or Judges of the Common Law, were utterly void and of none Effect. Fourthly, and laſtly it was objected, that the ſaid Commiſſioners were not nominated and appointed according to the ſaid Act, for the Juriſdiction and Power given by the ſaid (*a*) Act to the Crown, is to name ſuch Commiſſioners as be natural born Subjects, and it doth not appear by the ſaid ſpecial Verdict that the ſaid Commiſſioners were natural born Subjects: And albeit the Judges as private Men in their particular Knowledge did know them to be (*b*) natural born Subjects, yet they being Judges of Record ought only to ſee with judicial Eyes, and to take Knowledge of no more than doth appear to them within the Record, for upon that, and not upon private Knowledge out of Record, they only muſt give their Judgment, and upon that Record enter their Judgment alſo of Record. And ſeeing that the late Queen had, as it was ſaid by the Plaintiff's Counſel, Eccleſiaſtical Juriſdiction by the ſaid Act of Parliament, and by the ſame, Power was given unto her to name Eccleſiaſtical

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(*a*) 1 El. c. 1.

(*b*) Poph. 59, 60.

ſtaſtical Commiſſioners, ſhe of Neceſſity muſt make her Nomination according to the ſaid Act having no other Power, as was objected, but by the ſaid Act: And ſeeing it was not ſpecially found that they were natural born Subjects:

(a) 4 Co. 47. a. Vaugh. 72. 12 Co. 52. Hob. 295. Palm. 15 3 Bulſt. 110. 2 Inſt. 20.

Et (*a*) de non apparentibus & non exiſtentibus eadem eſt ratio: For this Cauſe alſo the ſaid Sentence of Deprivation was void, as given by Commiſſioners not warranted by the ſaid Act.

The Reſolutions of the Court to the 1ſt and 2d.

(b) 2 Rol. 222. 1 Jones 393.

As to the firſt and ſecond Objection, both being grounded upon the ſaid (*b*) Act of Parliament, it was reſolved by the whole Court, that notwithſtanding theſe two Objections, the Sentence was not to be impeached for either of them, and that for three Cauſes. Firſt, for that the ſaid Act concerning the Uniformity of Common Prayer,

(c) 2 Rol. 222. Poph. 60. 11 Co. 64. a.

being in the (*c*) Affirmative, doth not abrogate or take away the Juriſdiction Eccleſiaſtical, unleſs Words in the Negative had been added, as, and not otherwiſe, or in no other Manner or Form, or to the like Effect: And this appeareth by the general Rule of all our Books, as it appeareth in 46 Ed. 3. 4. 47 E. 3. 10. 20 H. 6. 11. 36 H. 6. 3. 3 Ed. 4. 27. 3 H. 7. 1. 14 H. 7. 10. 15 H. 7. 16. 33 H. 8. Dy. 50. 4. Mar. Dy. 135. Stradling's Caſe Pl. Com. 207. &c. ¶ 2. The Eccleſiaſtical Law and the

Eccleſiaſticos Commiſſionarios nominandi, illa neceſſario juxta illud ſtatut', cum aliam poteſtat', niſi inde, ut objectum erat, non haberet, eos nominaret: Cumq; non ſpeciatim inventum fuerit eos nativos fuiſſe ſubditos: *Et de non apparentib', & non exiſtentib' eadem eſt ratio*: Hanc etiam ob cauſ. deprivation' ſententia irrita erat, utiq; lata per Commiſſionarios non ſufficient' authoritat' munitos ex eod' ſtatuto.

Quod ad primam & ſecundam objectionem ſpectat, quorum utraque illi Parliamenti ſtatuto innititur, determinatum erat de totius Curiæ ſententia, quod objectionibus illis non obſtantibus ſententia lata in quæſtionem non eſſet vocanda idque tribus de cauſis. Primum quod ſtatutum illud de publicarum precum uniformitate, cum eſſet in parte affirmativa, juriſdictionem Eccleſiaſticam non abrogat aut tollit, niſi verba in parte negativa adjuncta fuiſſent, utique, *& non alias, vel ullo alio modo vel forma*, aut ad eundem ſenſum: Hoc manifeſto apparet, & clare conſtat ex generali omnium codicum noſtrorum regula, uti etiam in 46 E. 3. 4. 47 E. 3. 10. 20 H. 6. 11. 36 H. 6. 3. 3 E. 4. 27. 3 H. 7. 1. 14 H. 7. 10. 15 H. 7. 16. 33 H. 8. Dy. 50. 4. Mar. Dy. 135. ¶ 2. Lex Eccleſiaſtica

ſiaſtic' & temporal' ſuas ſeorſim procedendi formulas habent, & diverſos reſpiciunt ſcopos; altera temporalis ad pœnam infligendam corpori, terris, & bonis; altera ſpiritualis pro ſalute animæ; altera ad externum hominem plectendum, altera ad internum reformandum: Et hoc perſpicuum eſt in 12 *H.* 7. 22. & 10 *E.* 4. 10. &c. Hæ igitur diſtinctæ & ſeparatæ juriſdictiones apte cohærent, & in hoc coeunt, ut homo totus externe & interne reformetur. *Tertio*, Proviſo in prædicto ſtatuto hanc quæſtionem omni quæſtione liberat, nam ex eo proviſum, decretum, & ſancitum eſt authoritate præfata, quod omnes & ſinguli Archiepiſcopi & Epiſcopi, & ſinguli eorum Cancellariorum, Commiſſariorum, Archidiaconorum, quibus aliqua eſt ſpiriualis juriſdictio vigore ejuſdem ſtatuti plenariam poteſtatem, & authoritatem haberent, tam inquirendi in viſitationibus, Sinodis, & alibi intra ipſorum juriſdictionem, quam alio quouis tempore & loco accipiendi information' omnium, & ſingularum rerum, quæ ſupra memorantur commiſſæ vel perpetratæ intra limites & juriſdictionis & authoritatis eorum, eaſque puniendi admonitione, excommunicatione, ſequeſtratione, vel deprivatione, aut

Temporal Law have ſeveral Proceedings, and to ſeveral Ends: The one being Temporal to inflict Puniſhment upon the Body, Lands or Goods: The other being Spiritual, pro ſalute Animæ, the one to puniſh the outward Man, the other to reform the inward: And this appeareth in 12 H. 7. 22. & 10 Ed. 4. 10. &c. Then both theſe diſtinct and ſeveral Juriſdictions conſiſt and ſtand well together, and do join in this: To have the whole Man inwardly and outwardly reformed. ¶ 3. The Proviſo in the ſaid Act doth make this Queſtion without Queſtion, for by it is provided, ordained, and enacted by the Authority aforeſaid, That all and ſingular Archbiſhops and Biſhops, and every of their Chancellors, Commiſſaries, Archdeacons, and other Ordinaries, having any peculiar Eccleſiaſtical Juriſdiction, ſhould have full Power and Authority by Virtue of that Act, as well to enquire in their Viſitation, Synods, and elſewhere within their Juriſdiction, as at any other Time and Place to take Accuſations and Informations of all and every the Things above mentioned, done, committed or perpetrated within the Limits of their Juriſdiction and Authority, and puniſh the ſame by Admonition, Excommunication, Sequeſtration, or Deprivation, and other Cen-

To the 3d.

Cenſures and Proceſs in like Form as heretofore had been uſed in like Caſes by the Queen's Eccleſiaſtical Laws, as by the ſaid Act appeareth. So as ſeeing, if that Act had never inflicted any Puniſhment for depraving or not obſerving the Book of Common Prayer, yet the ſame being allowed and commanded to be obſerved for Uniformity of Common Prayer, and the Unity and Peace of the Church; The Eccleſiaſtical Judge may deprive ſuch Parſon, Vicar, &c. as ſhall deprave or not obſerve the ſaid Book, as well for the firſt Offence, as he might have done by the Cenſures of the Church, and the Eccleſiaſtical Laws, as if no Form of Puniſhment had been inflicted by that Act, And this doth evidently appear by the ſaid Proviſo: For thereby notwithſtanding any Thing in that Act contained, they may puniſh ſuch Offenders by Admonition, Excommunication, Sequeſtration, or Deprivation, and other Cenſures and Proceſs, in like Form as heretofore hath been uſed in like Caſes by the Queen's Eccleſiaſtical Laws, and are not bound to purſue the Form preſcribed by the ſaid Act, which is to puniſh the Offender according to the temporal Law. And it was reſolved, that if the Juriſdiction of the Archbiſhops and Bi-

aliis cenſuris, & procedendi formulis, perinde ac hactenus in uſu fuiſſet in ejuſmodi cauſis, regiis legibus Eccleſiaſticis, ut ex eod' ſtatut' manifeſte conſtat. Adeo ut ſi ſtatutum illud nunquam ullam pœnam pro depravando, vel non obſervando publicarum precum libro inflixiſſet; attamen cum liber ille approbatus, & ex mandato Regis obſervandus eſſet pro precum publicarum uniformitate, & unitate, ac pace Eccleſiæ conſervanda; Judex Eccleſiaſticus ejuſmodi Rectorem, Vicarium, &c. deprivare poteſt, qui eundem librum depravabit, vel non obſervabit, tam pro primo delicto, ut per Eccleſiæ cenſuras, & leges Eccleſiaſticas facere potuiſſet, quaſi nulla pœnæ aut puniendi forma per ſtatutum inflicta fuiſſet, & hoc per præfatum Proviſo dilucide manifeſtum eſt. Ex eo enim nihilo obſtante in præd' ſtatuto, delinquentes admonitione, excommunicatione, ſequeſtratione, deprivatione, & aliis cenſuris, & procedendi formulis, perinde ac ante in uſu fuerit in ejuſm' cauſis, per Eccleſiaſticas Regin' leges punire poſſunt, & non obſtricti ſunt ad formam proſequendam in eod' ſtatuto præſcript', quæ eſt delinquent' juxta legem temporal' punire. Determinat' etiam erat, quod ſi eo-

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dem ſtatuto proſpectum fuiſſet juriſdictioni Archiepiſcoporum, & Epiſcopor' & Cancellariorum, Commiſſariorum, Archidiaconorum, & aliorum Ordinariorum, quibus eſt peculiaris juriſdictio Eccleſiaſtica, *à fortiori* ſupremis Commiſſionariis authoritate munitis ex alio ſtatuto in eodem Parliamento *tacite* proviſum erat: *Quia cui licet quod majus eſt, non debet quod minus eſt non licere.* Ad objectionem vero tertiam per totam etiam Curiam determinatum erat, quod ſententia ab Epiſcopo cum Collegarum aſſenſu lata ejuſmodi erat ut communis legis Judices approbare debeant juxta Eccleſiaſticas leges latam fuiſſe: Cum etenim illis ſit authorit' procedendi, & ſentent' ferendi in cauſis Eccleſiaſt', juxta leges Eccleſiaſticas, & illi ſententiam tulerint in cauſa Eccleſiaſtica, juxta eor' procedendi formulam vi & virtute ejuſdem legis: Communis legis Judices ipſorum ſententiæ fidem adhibere & eandem approbare, juxta legem Eccleſiaſticam latam fuiſſe debent. Et hæc eſt recepta opinio in libris noſtris omnibus, ut liquet in 11 H. 7. 9. 34 H. 6, 14, &c. Et in cauſa *Bunting* & *Leppingwel* in 4 part' relation' mear'. Hæc eſt uſitata ſententiar' forma in Eccleſiaſticis ipſor' curiis: Et in hoc ipſo An. 23

ſhops and their Chancellors, Commiſſaries, Archdeacons, and other Ordinaries, having any peculiar Eccleſiaſtical Juriſdiction were provided for by the ſaid Act, a fortiori the high Commiſſioners authoriſed by an other Act in the ſame Parliament were tacite provided for; Quia (*a*) cui licet quod majus eſt, non debet quod minus eſt non licere. As to the third Objection it was alſo reſolved by the whole Court, that the Sentence given by the Biſhop, by the Conſent of his (*b*) Colleagues, was ſuch as the Judges of the Common Law ought to allow to be given according to the Eccleſiaſtical Laws: For ſeeing their Authority is to proceed and give Sentence in Eccleſiaſtical Cauſes, according to the Eccleſiaſtical Law, and they have given a Sentence in a Cauſe Eccleſiaſtical upon their Proceedings, by Force of that Law; The Judges of the Common Law ought to give (*c*) Faith and Credit to their Sentence, and to allow it to be done according to the Eccleſiaſtical Law; For (*d*) cuilibet in ſua arte perito eſt credendum. And this is the common received Opinion of all our Books, as appeareth 11 H. 7. 9. 34 H. 6. 14. &c. And in (*e*) Bunting and Leppingwel's Caſe, in the fourth Part of my Reports; And this is the uſual Form of all the Sentences in their Eccleſiaſtical Courts: And this very Point, Tr. 23. Reginæ,

(*a*) 4 Co. 23. a. 9 Co. 48. b. Father Parſon's 86. To the 3.

(*b*) Poph. 59. Antea 3. a. 4. b.

(*c*) 2 Rol. 7. 7 Co. 42. b. 4 Co. 29. a. 8 Co. 135. b. 2 Vent. 43. Cawly 31.

(*d*) 4 Co. 29. a. 7 Co. 19. a. Calvin's Caſe, Co. Lit. 125. a. 2 Leon. 176. Cawly 31.

(*e*) 4 Co. 29. a.

ginæ Eliz. in this Court between (a) Cheyney and Frankwell, all the Matter being found, as this Caſe is by ſpecial Verdict, was adjudged. As to the fourth Objection, videlicet; That the ſaid late Queen had only Power by Force of the ſaid Act, to nominate Commiſſioners for Eccleſiaſtical Cauſes, and therefore the aforeſaid Nominat' not purſuing the Authority given unto her by that Act ſhould be void. Hereunto a threefold Anſwer was given and reſolved by the whole Court. 1. That they which were Commiſſioners, and had Places of Judicature over the King's Subjects, ſhould be (b) intended to be Subjects born and not Aliens: But if in verity they were Aliens, yet in reſpect of the general Intendment to the contrary, it ought to be alledged and proved by the other Party; For (c) Stabitur præſumptioni donec probetur in contrarium. Secondly the Jurors have found that the Queen by her ſaid Letters Patents, did authoriſe them ſecundum formam Statuti prædicti; And therefore it doth by neceſſary Conſequence amount to as much as if they had found they had been Subjects born: For if they were not Subjects born, they could not be authoriſed ſecundum formam Statuti prædicti. Vide 11 H. 4. 4. 13 Elizab. Dyer fol. And the rather for that this is found by ſpecial Verdict. ¶ 3. It

(a) 2 Leon. 176, 177. 2 Rol. 224.

To the 4.

(b) 1 Jones 68.

(c) 2 Co. 48. a. 4 Co. 71. b. 6 Co. 73. b. Co. Lit. 373. b. 2 Bulſt. 314. Hob. 297.

Reginæ Eliz. in hac cur' inter *Cheney & Frankwell* adjudicatum erat, cum res tota, ut in hac cauſa, ſpeciali veredict' compert' fuerit. Ad quart' vero objectionem, viz. *Quod præd' Reginæ virtute præd' ſtatuti ſolummodo poteſtatem habuit nominandi Commiſſarios ad cauſas eccleſiaſticas & igitur præfata nominatio non ſubſequens authoritat' illi data tam iſto ſtatuto irrita eſſet.* Huic tripliciter reſponſum eſt, & per totam Cur' determinat'; Primo quod illi qui erant Commiſſarii, & locum judicandi int' Regis ſubditos tenerent, nativi eſſe ſubditi, & non exteri intelligi deberent: Sin aut' revera exteri eſſent, tamen eo quod generatim contraintellect' erat, ab alt' parte allegandum & proband' erat: Nam *ſtabitur præſumptioni donec probetur in contrarium.* Secundo, Juratores invener' Reginam authoritat' per Literas Patentes dediſſe *ſecund' formam ſtatuti prædicti*; & igitur ex conſequentia neceſſaria tantum valet, ac ſi eos ſubditos nativos fuiſſe inveniſſent: Si enim Nativi ſubditi non erant, authoritate non inſtructi fuiſſent *ſecundum authoritatem Statuti prædicti.* Vide 11 H. 4. 4. & 13 Elizab. Dyer Fol. Et potius cum hoc ſpeciali veredicto inventum ſit. Tertio de-

eterminat' erat, quod ſtatutum anni primi Reg' Elizabethæ de juriſdictione Eccleſiaſtica, non erat ſtatutum quod novam legem introduxerit, ſed antiquam declaraverit quod perſpici poteſt tam ex ipſo titulo ejuſd' ſtatuti, viz. *Statutum reſtituendi ad coronam juriſdictionem antiquam ſuper stat. Eccleſiaſtic' & Spirialem:* Quam etiam ex ipſius ſtatuti context' in diverſis ejuſdem partibus. Statutum enim illud non aliam juriſdictionem coronæ annectit quam quæ antea regera erat, aut eſſe debuit juxta antiquas hujus regni leges, particula regiæ juriſdictionis, & unita coronæ imperali, quæq; antea legitime exercebatur, & exerceri poterat intra regnum, cujus juriſdictionis, & formularum procedendi in ead' ſcopus erat, ut omnia in cauſis Eccleſiaſticis fierent ad divini nominis gloriam, virtutis incrementum, & pacis atque unitatis hujus regni conſervation', ut ex diverſis partibus ejuſdem ſtatuti liquet: igitur, ut ex illo ſtatuto nulla prætenſa juriſdictio intra hoc regnum exercita, quæ vel impia, aut prærogativæ vel antiq. legi coronæ hujus regni adverſa & repugnans reſtituebatur, vel reſtitui poterat prædictæ coronæ, ſecund' antiquum ejuſd' jus & legem: Ita ſi ſtatut' il-

was reſolved; That the ſaid Act of the firſt Year of the ſaid late Queen concerning Eccleſiaſtical Juriſdiction, was not a Statute introductory of a new Law, but (*a*) Declaratory of the Old, which appeareth as well by the Title of the ſaid Act, Videlicet. An Act reſtoring to the Crown the antient Juriſdiction over the State Eccleſiaſtical and Spiritual, &c. As alſo by the Body of the Act in divers Parts thereof. For that Act doth not (*b*) anner any Juriſdiction to the Crown, but that which in Truth was, or of Right ought to be by the antient Laws of the Realm Parcel of the King's Jurisdiction, and united to his Imperial Crown, and which lawfully had been, or might be exerciſed within the Realm: The End of which Juriſdiction, and of all the Proceeding thereupon was, that all Things might be done in Cauſes Eccleſiaſtical to the Pleaſure of Almighty God, the Increaſe of Virtue, and the Conſervation of the Peace and Unity of this Realm, as by divers Parts of the ſaid Act appeareth: And therefore as by that Act no pretended Jurisdiction exerciſed within this Realm, being either ungodly or repugnant to the Prerogative or the antient Law of the Crown of this Realm, was or could be reſtored to the ſame Crown, according to the antient Right and Law of the ſame: So if that

(*a*) 4 Inſt. 325. Cawley 5, 6. Cr. Jac. 37. Moor 755.

(*b*) Cawley 8.

Act of the first Year of the late Queen had never been made, it was resolved by all the Judges, that the King or Queen of England for the Time being may (*a*) make such an Ecclesiastical Commission as is before mentioned, by the antient Prerogative and Law of England. And therefore by the antient Laws of this Realm, this Kingdom of England is an absolute (*b*) Empire and Monarchy consisting of one Head, which is the King, and of a Body politick, compact and compounded of many, and almost infinite several, and yet well agreeing Members; All which the Law divideth into two several Parts, that is to say, The Clergy and the Laity, both of them, next and immediately under God, subject and obedient to the Head: Also the Kingly Head of this politick Body is instituted and furnished with (*c*) plenary and entire Power, Prerogative and Jurisdiction, to render Justice and Right to every Part and Member of this Body, of what Estate, Degree, or calling soever in all Causes Ecclesiastical or Temporal, otherwise he should not be a Head of the whole Body. And as in temporal Causes, the King by the Mouth of the Judges in his Courts of Justice doth judge and determine the same by the temporal Laws of England: (*d*) So in Causes Ecclesiastical and Spiritual, as namely, Blasphemy,

(*a*) 4 Inst. 326. Cr. Jac. 37. Hetl. 19.

(*b*) Postea 28. b.

(*c*) Hob. 17.

(*d*) Co. Lit. 96. a. b. 344. a. What Causes belong to the Ecclesiastical.

lud anni primi prædictæ Reginæ nunquam sancitum fuisset, determinat' & judicatum erat, quod Rex vel Regina Angliæ qui pro tempore fuerit, ejusmodi Ecclesiasticam Commissionem (cujusmodi antea memorata est) per antiquam prærogativam, & Angliæ legem instituere possit. Juxta igitur leges hujus regni antiquas, hoc Angliæ Regnum absolutum est Imperium & monarchia, ex uno capite, viz. Rege, & ex corpore politico compacto & composito ex membris distinctis quam plurimis, & fere infinitis, nihilominus inter se cohærentibus, consistens. Quæ omnia lex bifariam in Clericos & Laicos dividit, qui utrique proxime & immediate sub Deo suo capiti subjiciuntur & obsequuntur. Regium etiam hujus politici corporis caput plenaria & integra potestate prærogativa, & jurisdictione ad suum cuique hujus corporis membro distribuend' cujuscunque loci ac ordinis, in omnibus causis Ecclesiasticis, vel secularibus instructum est, & armatum; alias totius corporis caput non esset. Et perinde ac in secularibus causis, Rex in foris judicialibus causas temporales judicat & determinat juxta leges Angliæ temporales: Ita in causis Ecclesiasticis & spiritualibus, scilicet blasphemia, Apostasia, Hæresibus,

Schis-

Schismatibus, Ordinibus conferendis, Clericorum admissionibus, & institutionibus, rerum divinarum celebratione, ritibus matrimonialibus, divortiis, bastardiis generalibus, decimarum jure, & earundem Substractionibus, oblationibus, obventionibus, dilapidationibus, Ecclesiarum reparationibus, testamentorum probationibus, administrationibus, simoniis, incestibus, fornicationibus, adulteriis, castitatis oppugnationibus, petitionibus, procurationibus, appellationibus Ecclesiasticis, Pœnitentiæ commutatione, & aliis, (quorum cognitio ad communes leges Angliæ non spectat) a judicibus Ecclesiastic' determinandæ & decidendæ sunt juxta hujus Regni regias leges Ecclesiastic'. Quemadmodum enim leges, quas Athenis Romani transtulerunt, cum ab ipsis comprobatæ & confirmatæ fuissent, eas nihilominus *Jus civile Romanorum* nominarunt, uti etiam Normanni pleraſque ipsor' leges ex Anglia mutuo acceptas nomine legum vel consuetudin' Normanniæ insignierunt: Sic licet Angliæ Reges, Ecclesiasticas quas habent leges, ab aliis deduxerunt, ex illis tamen quotquot hic generali omnium & consensu approbatæ fuerunt, appositè & rectè *Angliæ leges reg' Ecclesiasticæ* appellantur; qd' Apostasy from Christianity, Heresies, Schisms, ordering Admissions, Institutions of Clerks, Celebration of divine Service, Rights of Matrimony, Divorces, general Bastardy, Subtraction and Right of Tithes, Oblations, Obventions, Dilapidations, Reparation of Churches, Probate of Testaments, Administrations and Accounts upon the same, Simony, Incests, Fornications, Adulteries, Solicitation of Chastity, Pensions, Procurations, Appeals in Ecclesiastical Causes, Commutation of Penance, and others (the Conusance whereof belong not to the Common Laws of England) the same are to be determined and decided by Ecclesiastical Judges, according to the King's Ecclesiastical Laws of this Realm: For as the Romans fetching divers Laws from (*a*) Athens, yet being approved and allowed by the State there, called them notwithstanding Jus Civile Romanorum: And as the (*b*) Normans borrowing all or most of their Laws from England, yet baptized them by the Name of the Laws or Customs of Normandy: So albeit the Kings of Engl. derived their Ecclesiastical Laws from others, yet so many as were proved, approved and allowed here, by land with a general Consent, are aptly and rightly called, The (*c*) K's Ecclesiastic' Laws of England, which whosoever

Courts, See Circumspecte agatis, 13 E. 1. W. 2. 13 E. 1. c. 5. versus finem, Artic. cleri 9 E. 2. 15 E. 3. c. 6. 31 E. 3. c. 11. 2 H. 5. cap. 7. 1 H. 7. cap. 4. 23 H. 8. cap. 9. 24 H. 8. c. 12. 27 H. 8. c. 20. 32 H. 8. c. 7. 1 E. 6. cap. 2. 2 E. 6. cap. 13. 1 Mar. cap. 3. 1 Eliz. cap. 1. 5 Eliz. c. 23. 13 Eliz. c. 10. Lit. lib. 2. cap. Frankal. f. 30. F. N. B. f. 41, 42, 43, 44, 45, 46, 47. Reg. f. 33, 34, 44.

(*a*) Dav. 71. a.

(*b*) Præf. ad 3. Rep. circa finem.

(*c*) Co. Lit. 11. b. Dr. Conſins's Apology 102.

ſoever ſhall deny, he denieth that the King hath full and plenary Power to deliver Juſtice in all Cauſes to all his Subjects, or to puniſh all Crimes and Offences within his Kingdom: For that as before it appeareth the Deciding of Matters ſo many, and of ſo great Importance, are not within the Conuſance of the Common Laws, and conſequently that the King is no complete Monarch, nor Head, of the whole and intire Body of the Realm. But (*a*) to confirm thoſe that hold the Truth, to ſatisfy ſuch as being not inſtructed, know not the ancient and modern Laws and Cuſtoms of England, every Man being perſuaded as he is taught: Theſe few demonſtrative Proofs out of the Laws of England, inſtead of many in Order, & ſerie temporum, are here added.

(*a*) Parſon's Anſwer to the 5th Rep. 93.

quicunq; denegaverit, idem denegat Regem plenariam habere poteſtatem, juſtitiam in omnibus cauſis ſuis ſubditis adminiſtrandi, vel crimina & delicta infra hoc regnum puniendi: Quia, ut jam liquido conſtat, determinatio tot & tanti momenti cauſarum in cognitionem legum communium non cadit, & conſequenter Rex non eſt abſolutus Monarcha, nec caput totius integri corporis hujus regni. Sed ad eos confirmandos, qui veritatem agnoſcunt, & ad ſatisfaciendum illis, qui nondum inſtructi antiquas & modernas Angliæ leges & conſuetudines ignorant, cum ſinguli ita ſint perſuaſi ut informati: Hæc paucula argumenta certiſſima & quaſi Apodeictia, quæ inſtar multor' eſſe poſſint, ſuo ordine, & tempor' ſerie hic ſubjiciuntur.

(*b*) Kenulphus Rex, &c. per Literas ſuas Patentes, conſilio & conſenſu Epiſcoporum, & Senatorum gentis ſuæ, largitus fuit Monaſterio de Abnidon in comitatu Berk. ac cuidam Ruchnio tunc Abbati Monaſterii, &c. quandam ruris ſui portionem, id eſt quindecim Manſias, in loco qui a Ruricolis tunc nuncupabatur Culnam cum omnibus utilitatibus ad eandem pertinentibus, tam in magnis quam in modicis rebus in æternam hæreditatem. Et quod prædictus Ruchnius, &c. ab omni epiſcopali Jure in ſempitern' eſſet quietus ut inhabitatores ejus, nullius Epiſcopi

(*b*) This King reigned A. D. 755. Stamford lib. 3. c. 38. f. 111. Full. Ch. Hiſt. 101, 102. Parſon's Anſwer 93, 94, 95. Dav. 73. a. Br. Coron. 129. Moor 120. Stanf. Coron. 111. b. Burn. Reform. Pars 1. lib. 3. f. 187. This Charter was pleaded 1 H. 7. 23, 25. Nota.

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res ejus nullius Episcopi, aut suorum officialium jugo inde deprimantur, sed in cunctis rerum eventibus & discussionibus causarum, Abbatis Monasterii prædicti decreto subjiciantur. Ita qd', &c. Ut ex eadem Charta anno 1 *Hen.* 7. producta, & a *Stanfordo* allegata plene apparet: Quæ Charta concessa ante annos 850, confirmata fuit *per Edwinum Britanniæ Anglorum Regem & Monarcham:* Ex qua perspicuum est, Regem charta sua in Parliamento confecta, consilio & consensu Episcoporum & Senatorum gentis suæ, qui in Parliamento convenerant, prædict' Abbatem Episcopi jurisdictione liberasse & exemisse, &c. Et eadem charta Abbati intra ejus Monasterium, Ecclesiasticam jurisdictionem concessit: Quæ Ecclesiastica jurisdictio a corona derivata, usq; ad dissolutionem ejusdem Monasterii tempore H. 8. permansit.

aut suorum officialium jugo inde deprimantur, sed in cunctis rerum eventibus & discussionibus causarum, Abbatis Monasterii prædicti decreto subjiciantur. Ita quod, &c. As by the said Charter pleaded in 1 Henrici 7. and vouched by Stanford, at large appeareth: which Charter granted above 850 Years since, was after confirmed per Edwinum Britanniæ Anglorum Regem & Monarcham: By (a) which it appeareth that the King by his Charter made in Parliament (for it appeareth to be made by the Counsel and Consent of his Bishops and Senators of his Kingdom which were assembled in Parliam.) did discharge and exempt the said Abbot from the Jurisdiction of the Bishop, &c. And by the same Charter did grant to the said Abbot Ecclesiastical Jurisdiction within his said Abby, which Ecclesiastical Jurisdiction being derived from the Crown, continued until the Dissolution of the said Abby, in the Reign of King Henry the eighth.

Rex Edwin. regnavit anno Dom. 955.

(a) Full. Ch. Hist. 102. Parson's Answ. 94.

Regnante Anglor' Rege Edwardo Confessore.

REX autem, qui Vicarius summi Regis est, ad hoc constitutus est, ut regnum & popul' Domini & super omnia sanctam Eccles. regat & defend' ab injuriosis, maleficos autem destruat.

In the Reign of King *Edward the Confessor.*

THE King, who is the Vicar of the highest King, is ordained to this End, that he should govern and rule the Kingdom and People of the (a) Land, and above all Things the holy Church, and that he defend the same,

S. K. Edw. Laws c. 19.

(a) Spelm. Coun. Tom. 1. pag. 634

from wrong Doers, and destroy and root out Workers of Mischief. And this shall suffice for many before the Conquest.

Et hoc pro multis ante Conquestum sufficiat.

In the Reign of K. *William* I.

Regnante Gulielmo primo.

7 E. 3. Tit. Quare Impedit 19.
(*a*) Dav. 73. a.

IT is agreed that no Man can make any Appropriation of any Church having Cure of Souls, being a Thing Ecclesiastical, and to be made to some Person Ecclesiastical, but he that hath Ecclesiastical Jurisdiction: But (*b*) William the first of himself without any other, (as King of (*c*) England) made Appropriation of Churches with Cure, to Ecclesiastical Persons; wherefore it followeth that he had Ecclesiastical Jurisdiction.

(*b*) Seld. Not. ad Eadmer. 165.

(*c*) Burnet's Reform. Pars 1. lib. 3. f. 187.

INter omnes convenit, qd nemo possit appropriare ullam Ecclesiam, cui animarum cura incumbit, cum sit res Ecclesiastica, & Ecclesiasticæ personæ appropriandæ, nisi ille qui jurisdictionem habet Ecclesiasticam: Sed Rex *Gulielmus* primus ex se sine quovis alio, Ecclesias cum cura personis Ecclesiasticis ut Rex Angliæ appropriavit, unde ipsum Ecclesiast' jurisdictionem habuisse consequitur.

In the Reign of K. Henry I.

Regnante Henrico primo.

The Charter of H. 1. Founder of the Abbey of Reading, in the 26th Year of his Reign, and in the Year of our Lord, 1125.

HEnry by the Grace of God King of England, Duke of Normans: To all Archbishops, Bishops, Abbots, Earls, Barons, and to all Christians as well present as to come, &c. We do ordain as well in Regard of Ecclesiastical as Royal Power, that whensoever the Abbot of Reading shall die, that all the Possessions of the Monastery wheresoever it is, do remain intire and free with all the Rights and Customs thereof, in the Hands and Disposition

Henric' Dei gratia Rex Angliæ, Dux Normannorum, Archiepiscopis, Episcopis, Abbatibus, Comitibus, Baronibus suis, & omnibus Christianis tam præsentibus quam futuris salutem perpetuam, &c. Statuimus autem tam Ecclesiasticæ quam regiæ prospectu potestatis, ut decedente Abbate Radingensi, omnis possessio monasterii ubicunq; fuerit, remaneat integra & libera cum omni jure & consuetudine sua, in manu & dispositione

positione Prioris & Monachorum capituli Radingensis; hoc autem ideo statuimus, statutumq; perpetuo servandum firmavimus, quia Abbas Radingensis non habet proprios redditus sed communes cum fratribus; qui autem Deo annuente Canonica electione Abbas substitutus fuerit non cum suis secularibus consanguineis seu quibuslibet aliis, eleemosinas monasterii male utendo dispendat, sed pauperibus & peregrinis, & hospitibus suscipiendis curam gerat, terras censuales non ad feudum donet, nec faciat milites nisi in sacra veste Christi, in qua parvulos suscipere modeste caveat, maturos autem seu discretos, tam Clericos quam Laicos suscipiat.

of the Prior and the Monks of the Chapter of Reading: We do therefore ordain and establish this Ordinance to be observed for ever, because the Abbot of Reading hath no Revenues proper and peculiar to himself but common with his Brethren: Whosoever by God's Will shall be appointed Abbot in this Place by Canonical Election, may not dispend the Alms of the Abbey by ill Usage with his secular Kinsmen, or any other, but in entertaining the poor Pilgrims and Strangers, and that he have a Care not to give out the Rent-lands in Fee, neither that he make any Servitors or Soldiers, but in the sacred Garment of Christ, wherein let him be advisedly provident he entertain not young ones, but that he entertain Men of ripe Age or discreet, as well Clerks, as Laymen.

Regnante Henrico Tertio.

In the Reign of King *Henry* III.

TEmpore H. 3. & progenitorum ejus Regum Angliæ, & jam inde, siquis aliquem in jus vocaret coram judice Ecclesiastico intra regnum ulla de re, cujus cognitionem legitimam illa curia approbatione & consuetudine non haberet, Rex semper per breve sub magno Sigillo procedere prohibuit: Quod si suggestio illa Regi facta, in

IN all the Time of H. 3. and his Progenitors Kings of England, and ever since, if any Man did sue before any Judge Ecclesiastical within the Realm for any Thing whereof that Court by Allowance and Custom had not lawful Comusance, the K. did ever by his Writ under his Great Seal prohibit them to proceed: And if the Suggestion made to the King, whereupon

2 H. 3. Tit. Prohibit. 13. 4 H 3: ib. 15. 15 H. 3. Tit Prohib. 22. Register fol. F. N. B. Tit. Prohibition 48, 41, &c.

the Prohibition was grounded, were after found untrue, then the King by his Writ of Conſultation under his great Seal, did allow and permit them to proceed. Alſo, in all the Reign of H. 3. and his Progenitors Kings of England, and ever ſince, if any Iſſue were joined upon the Loyalty of Marriage, general Baſtardy, or ſuch like, the King did ever write to the Biſhop of that Dioceſe, as mediate Officer and Miniſter to his Court, to certify the Loyalty of Marriage, baſtardy, or ſuch like; all which do apparently prove, that thoſe Eccleſiaſtical Courts were under the K's Juriſdict' and Commandment and that one of the Courts were ſo neceſſarily incident to the other, as the one without the other could not deliver Juſtice to the Parties, as well in theſe particular Caſes, as in a Number of Caſes before ſpecified, whereof the K's Eccleſiaſtical Court hath Juriſdiction: Now to command, and to be obeyed, belong to ſovereign and ſupreme Government.

By the ancient Canons and Decrees of the Church of Rome the Iſſue born before Solemnization of Marriage, is as lawful inheritable, (Marriage following) as the Iſſue born after Marriage; But this was never allowed or appointed in England, and therefore was never of any Force here: And this appeareth by the Statute of

quam prohibitio innixa erat minime vera comperta eſſet, Rex per breve ſuum conſultationis ſub magno ſuo ſigillo procedere permiſit. Præterea tempore hujus H. 3. & progenitorum ejus Regum Angliæ, & jam inde, ſi de bigamia, generali baſtardia, vel hujuſmodi ad litis conteſtationem perventum eſſet, Rex ſemper Epiſcopo ejus Dioceſios, ut mediato officiario & miniſtro imperat, ut de bigamia, baſtardia & hujuſmodi ſignificaret: Quæ omnia plane comprobant Eccleſiaſtica illa fora Regis juriſdictioni & imperio ſubjici & eadem fora ita neceſſario coincidere, ut alterum ſine altero jus ſuum cuique tribuere non poſſet, tam in his cauſis particularib', quam in pluribus aliis prius memoratis quarum regia fora Eccleſiaſtica habent juriſdictionem. Ad Reges autem & Monarchas ſolum modo ſpectat, ut ipſi imperent, & ipſis imperantibus alii obtemperent.

Juxta antiq' Roman' Eccleſ. Canones & decreta proles ante matrimon' celebratum nata, perinde legitima eſt & hæreditat' adeat (matrimonio ſubſequente) quam quæ poſt matrimon' nata ſit: Verum enimvero hoc in Angl' nunquam approbat' vel admiſſum, & igitur vim nullam hic habuit, q[uod]

ex ſtatuto de Merton anno viceſimo H. 3. perſpicue hiſce verbis eluceat.

Ad breve Regis de Baſtardia, utrum aliquis natus ante matrimonium habere poterit hæreditatem, ſicut ille qui natus eſt poſt matrimon', reſponderunt omnes Epiſcopi quod nolunt nec poſſunt ad iſtud breve reſpondere, quia hoc eſſet contra communem formam Eccleſ. Et rogaverunt omnes Epiſc' magnates, ut conſentirent, quod nati ante matrimonium eſſent legitimi ſicut illi qui nati ſunt poſt matrimonium, quantum ad ſucceſſionem hæreditariam, quia Eccleſia tales habet pro legitimis. Et omnes Comites & Barones una voce reſponderunt; Nolumus leges Angliæ mutare quæ hucuſque uſitatæ ſunt & approbatæ.

Merton, made in the 20th Year of King Henry III.

The Statute of Merton an. 20. H. 3.

To the King's Writ of Baſtardy, whether one being born before Matrimony may inherit in like Manner, as he that is born after Matrimony, all the Biſhops anſwered that they would not, nor could not anſwer to it, becauſe it was direcly againſt the common Order of the Church; and all the Biſhops inſtanced the Lords, that they would conſent, that all ſuch as were born before Matrimony ſhould be legitimate, as well as they that be born within Matrimony, as to the Succeſſion of Inheritance, forſomuch as the Church accepteth ſuch to be legitimate: And all the Earls and Barons with one Voice anſwered, We (a) will not change the Laws of England which hitherto have been uſed and approved.

(a) Moor 120. Præf. 4 Rep. Co. Lit. 245. a. 2 Inſt. 96, 97.

Regnante Edwardo *primo.*

EDwardo ejus nominis primo regnante, ſubditus quidam excommunicat' bullam contra alterum hujus Regni ſubditum intulit, & coram Domino Theſaurario Angliæ divulgavit, hoc læſæ Majeſtatis crimen contra Regiam Coronam & dignitat' judicatum eſt;

In the Reign of King *Edward* the Firſt.

IN the Reign of King Edward the firſt, a Subject brought in a Bull of Excommunication againſt another Subject of this Realm, and publiſhed it to the Lord Treaſurer of England, and this was by the antient common Law of England adjudged Treaſon againſt the King, his Crown and Dignity, for the

Vide 30 E. 3. lit. Aſſ. pl. 19. Brooke Tit. Præmûnire pl. 10. Note this was by the common Law of England before any Stat. made.

which the Offender ſhould have been drawn and hanged, but at the great Inſtance of the Chancellor and Treaſurer, he was only abjured the Realm for ever.

pro quo delinquens extremo ſupplicio afficiendus erat, trahendus ſcilicet & ſuſpendendus. Sed Cancellario & Theſaurario intercedentibus, Regnum ſolummodo in perpetuum abjuravit.

19 E. 3. Tit. Quare non admiſit 7.

Vide 39 E. 3. 20.

The ſaid King Edward I. preſented his Clerk to a Benefice within the Province of York, who was refuſed by the Archbiſhop, for that the Pope by Way of Proviſion had conferred it on another; The King thereupon brought a Quare non admiſit, the Archbiſhop pleaded that the Biſhop of Rome had long Time before provided to the ſaid Church, as one having ſupreme Authority in that Caſe, and that he durſt not nor had Power to put him out, which was by the Pope's Bull in Poſſeſſion: For which his high Contempt againſt the King, his Crown and Dignity, in refuſing to execute his Sovereign's Commandment, fearing to do it againſt the Pope's Proviſion, by Judgment of the Common Law, the Lands of his whole Biſhoprick were ſeiſed into the King's Hands and loſt during his Life; which Judgment was before any Statute or Act of Parliament was made in that Caſe. And there it is ſaid, that for the like Offence, the Archbiſhop of Canterbury had been in worſe Caſe by the Judgment of the Sages of the Law, than to be

Idem Rex *Edward'* Clericum ſuum ad beneficium in Provincia Eboracenſi nominavit, qui ab Archiepiſcopo rejectus, quoniam Papa per Proviſionem idem beneficium alteri contulerat; Hinc Rex emiſit breve *Quare non admiſit*, allegavit Archiepiſcopus, qd' Pontifex Romanus jam antea eidem beneficio alterum providiſſet, utique qui ſupremam in illa cauſa authoritatem haberet, & qd' ipſe minime auſus ſit, nec poteſtatem habuerit ipſum amovendi, qui per Bullam papalem jam poſſederat. Pro hoc contemptu in Regem, coronam, & dignitat', eo quod recuſaverit ſupremi ſui Domini mandatum exequi contra proviſionem papal', Commun' Legis judicio poſſeſſiones totius Epiſcopatus in Regis manus fuere redactæ, & ad ejus vitam amiſſæ: Quæ ſententia lata fuit, priuſquam aliqd' Parliamenti ſtatutum hac de re factum fuerit. Ibid' etiam memoratur, quod pro ejuſmodi delicto aſperius actum fuiſſet cum Archiepiſcopo, Cantuar. Juris conſultiſſimorum judicio, quam pro

con-

contemptu puniri, niſi Rex in gratiam accepiſſet.

De *Bigamis* quos Dominus Papa in Concilio ſuo Lugdunienſi omni privilegio Clericali privavit, per Conſtitutionem inde æditam, & unde quidam prælati illos qui effecti fuerunt Bigami ante prædictam Conſtitutionem, (quando de felonia rectati fuerunt) tanquam Clericos exigerunt ſibi liberandos. Concordatum eſt & declaratum coram Rege & Concilio ſuo, quod Conſtitutio illa intelligenda ſit, quod ſive effecti fuerint Bigami ante prædictam Conſtitutionem, ſive poſt, de cætero non liberentur Prælatis, immo fiat eis juſtitia ſicut de Laicis.

punished for a Contempt, if the King had not extended Grace and Favour to him.

Concerning Men twice married (called Bigami) whom the Biſhop of Rome by a Conſtitution made at the Council of Lions hath excluded from all Privilege of Clergy, whereupon certain Prelates (when ſuch Perſons have been attainted for Felons) have prayed for to have them delivered as Clerks which were made Bigami before the ſame Conſtitution. It is agreed and declared before the King and his Council, that the ſame Conſtitution ſhall be underſtood in this wiſe, that whether they were Bigami before the ſame Conſtitution or after, they ſhall not from henceforth be delivered to the Prelates, but Juſtice ſhall be executed upon them as upon other Lay People.

The Statute of Bigamis in An. 4 E. 1. Obſerve how the King by Advice of his Council (that is by Authority of Parliament) expounded how the ſaid Council ſhould be underſtood, and in what Senſe it ſhould be received and allowed here.

In Statuto Parliamenti Carleoli habito anno regni ejuſdem Regis *Edwardi primi* 25. declaratum eſt, quod Sacroſancta Eccleſia Anglicana in ſtatu Præſulum intra regnum Angliæ, per Angliæ Regem & ejus progenitores ad populum in Lege Dei inſtituend', hoſpitalitatem colendam, eleemoſynam erogandam, & ad alia charitatis opera exercenda, &c. fundata fuiſſet; Eoſdemque Reges temporibus retroactis ſolere Præſulum & Clericorum, quos evexer', concilio & judicio uti ad Regni incolumitat'

In an Act made at a Parliament holden at Carliſle in the xxv. Year of the ſaid King Edw. the Firſt, It is declared, that the holy Church of England was founded in the State of Prelacy within the Realm of England, by the King and his Progenitors, &c. for them to inform the People in the Law of GOD, and to keep Hoſpitality, give Almes, and do other Works of Charity, &c. And the ſaid Kings in Times paſt were wont to have their Advice and Counſel for the Safeguard of the Realm when they had need of ſuch

Statutum de Anno 25 E. 1. Carliſle. Vide 20 E. 3. Tit. Eſſoin 24.

Pre-

Note, The first Attempt was to usurp upon such Ecclesiastical Things as pertained to the Clergy of England, who at that Time stood in great Awe of the Church of Rome.

Prelates and Clerks so advanced; The Bishop of Rome usurping the Seigniories of such Benefices, did give and grant the same Benefices to Aliens which did never dwell in England, and to Cardinals which might not dwell here, &c. in Adnullation of the State of the holy Church of England, Disherison of the King, Earls, Barons and other Nobles of the Realm, and in Offence and Destruction of the Laws and Rights of this Realm, and against the good Disposition and Will of the first Founders; It was enacted by the King, by Assent of all the Lords and Commonalty in full Parliament: That the said Oppressions, Grievances, and Damage in this Realm, from thenceforth should not be suffered, as more at large appeareth by that Act.

Post. f. 18. a.

cum opus fuerit; quodque Pontifex Romanus sibi usurpans ejusmodi beneficiorum Ecclesiasticorum superioritatem, eadem beneficia exteris qui nunquam in regno Angliæ habitabant, & Cardinalibus qui hic habitare non poterant, &c. contulerit, ad statum Sacrosanctæ Ecclesiæ Anglicanæ subvertendum, ad Regem cum Comitibus, Baronibus, & Regni Proceribus hæreditate avita deprivandum, ad leges & consuetudines hujus Regni tollendas, & ad consilia voluntatesq; fundatorum infringenda: Unde sancitum erat per Regem cum assensu Procerum & Communitatis in pleno Parliamento, quod prædictæ oppressiones, gravamina, & detrimenta in hoc Regno jam inde amoverentur & tollerentur, ut plenius ex ipso statuto apparet.

In the Reign of King *Edw.* the Second.

Regnante Edwardo Secundo.

ALbeit by the Ordinance of Circumspecte agatis made in the xiii. Year of Edw. I. and by general Allowance and Usage, the Ecclesiastical Court held Plea of Tithes, Obventions, Oblations, Mortuaries, Redemptions of Penance, laying of violent Hands upon a Clerk, Defamations, &c. yet did not the Clergy think themselves assured nor quiet from Prohibit.

ETsi ex Decreto *Circumspecte agatis* facto anno *Edw. primi* 13. recepta approbatione & consuetudine fore Ecclesiastica placita tenuerint, & judicia exercuerint de Decimis, obventionibus, oblationibus, mortuariis, pœnitentiæ redemptionibus, violenta manus injectione in Clericos, defamationibus, &c. Clerici tamen se minime securos a Prohi-

Prohibitionibus per Subditos procuratis exiſtimarunt donec *Rex Edwardus ſecundus* per Literas Patentes cum conſenſu Parliamenti ad Cleri petitionem, illis juriſdictionem in prædictis cauſis exercere conceſſiſſet. Rex in Parliamento anno regni ſui nono, poſt particularia reſponſa ad petitiones eorum de rebus præfatis concedit, & Regium aſſenſum hiſce verbis præbuit.

Nos deſiderantes ſtatui Eccleſiæ Anglicanæ, & tranquilitati & quieti Prælatorum Cleri prædictorum, quatenus de jure poterimus providere, ad honorem Dei, & emendationem ſtatus dictæ Eccleſiæ & Prælatorum & Cleri prædicti, omnes & ſingulas reſponſiones, prædictas quæ patent in eodem Actu, ac omnia & ſingula in eiſdem reſponſionibus contenta ratificantes & approbantes; ea pro nobis & hæredibus noſtris concedimus & præcipimus imperpetuum inviolabiter obſervari: Volentes & concedentes pro nobis & hæredibus noſtris, Quod prædicti Prælati & Clerus, & eorum Succeſſores, imperpetuum in præmiſſis Juriſdictionem Eccleſiaſticam exerceant, juxta tenorem reſponſionis prædictæ.

purchaſed by Subjects, until that King Edw. the 2. by his Letters Patents under the Great Seal, in and by Conſent of Parliament, upon the Petitions of the Clergy, had granted unto them to have Juriſdiction in thoſe Caſes. The King in a Parliament holden in the 9 Year of his Reign, after particular Anſwers made to their Petitions, concerning the Matters aboveſaid, doth grant and give his Royal Aſſent in theſe Words.

The Statute of 9 E. 2. Artic. Cleri. 16.

See the Ordinance of Circumſpecte agatis 13 E. 1. to this Effect.

We deſiring as much as of Right we may, to provide for the State of the Church of England, and the Tranquility and Quiet of the Prelates of the ſaid Clergy, to the Honour of God, and the Amendment of the State of the ſaid Church, and of the Prelates and Clergy, ratifying and approving all and ſingular the ſaid Anſwers which appear in the ſaid Act, and all and ſingular Things in the ſaid Anſwers contained; we do for us and our Heirs grant and command, that the ſame be inviolably kept for ever: Willing and granting for us and our Heirs; That the ſaid Prelates and Clergy and their Succeſſors for ever, do exerciſe Eccleſiaſtical Juriſdiction in the Premiſſes according to the Tenor of the ſaid Anſwer.

By this Statute of 9 E. 2. and the Statutes of 15 E. 3. c. 6. 31 E. 3. c. 11. and by other Statutes heretofore mentioned, the Juriſdiction of the Eccleſiaſtical Courts is allowed and warranted by Conſent of Parliament, in all Cauſes wherein they now have Juriſdiction, ſo as theſe Laws may be juſtly called, the King's Eccleſiaſtical Laws of England.

In

In the Reign of King *Edw.* the Third.

Regnante Edwardo tertio.

16 E. 3. Tit. Excom. 4.

AN Excommunication by the Archbiſhop, albeit it be diſannulled by the Pope or his Legates, is to be *(a)* allowed, neither ought the Judges give any Allowance of any ſuch Sentence of the Pope, or his Legate.

(a) Co. Lit. 134. a. F. N. B 64. f. Poſtea 16. a.

In the Reign of E. 3.

It is often reſolved that all the *(b)* Biſhopricks within England were founded by the King's Progenitors, and therefore the Advowſons of them all belong to the King, and at the firſt they were Donative; And that if an Incumbent of any Church with cure die, if the Patron preſent not within 6 Months, the Biſhop of that Dioceſe ought to collate, to the End the Cure may not be deſtitute of a Paſtor: If he be negligent by the Space of 6 Months, the Metropolitan of that Dioceſe ſhall confer one to that Church: And if he alſo leave the Church deſtitute by the Space of 6 Months, then the Common Law giveth to the King as to the Supream within his own Kingdom, and not to the Biſhop of Rome, Power to provide a competent Paſtor for that Church.

(b) Co. Lit. 134. a. 3 Co. 75. b.

17 E. 3. 23.

The King may not only exempt any Eccleſiaſtical Perſon from the Juriſdict. of the Ordinary, but may grant unto him Epiſcopal Juriſdict. As thus it appeareth there the

EXcommunicatio facta per Archiepiſcopum, licet adnullata ſit per Papam, aut ejus a latere Legatum, eſt approbanda, nec Judices ullo modo ſententiam Papæ, aut ejus a latere Legati in Anglia approbare debent.

Sæpius determinatum eſt omnes Epiſcopatus Angliæ per Regis Progenitores fundatos fuiſſe, & igitur advocationes eorum omnium ad Regem ſpectare; principio etiam donativos fuiſſe, & quod ſi Incumbens alicujus Eccleſiæ cum Cura diem obierit, ſi Patronus intra ſex menſes non preſentaverit, Epiſcopus Dioceſios conferre debet, ne Eccleſia paſtore ſit deſtituta: Si autem ille ſex menſes neglexerit, Metropolitanus Provinciæ aliquem ad illam Eccleſiam preſentabit: Si autem Archiepiſcopus Eccleſiam ſex Menſes deſtitui ſinat, lex regni Communis poteſtatem providendi idoneum paſtorem eidem Eccleſiæ concedit Regi, tanquam ſupremo intra Regnum ſuum, & non Pontifici Romano.

Rex non ſolum Eccleſiaſticam perſonam quamcunq; ab Ordinarii juriſdictione eximere, verum etiam juriſdictionem Epiſcopalem ipſi concedere poteſt; ut eo loci conſtat

conſtat Regem Archidiacono Richmondiæ olim feciſſe.

Singulæ ædes Religioſæ vel Eccleſiaſticæ quarum Rex fundator extitit, ab ipſo Rege omni juriſdictione ordinaria ſunt exemptæ & per Eccleſiaſticam Regis commiſſionem ſunt ſolummodo viſitandæ & corrigendæ.

Abbas Burgi Sancti Edmundi in Suffolcia diplomate regio ab omni Epiſcopali juriſdictione exemptus erat.

Qui fuerat præſentatus ad Eccleſiam per Dominum Regem, impeditus fuit per quendam qui impetraverat Bullas a Curia Romana, quapropter carceri perpetuo emancipatus fuit, &c.

Decimas ex locis extra aliquam parochiam Rex habebit, quoniam cum illi ſit ſuprema juriſdictio Eccleſiaſtica, obligatus eſt ſufficientem Paſtorem providere, qui curam ejuſmodi loci qui intra alicujus Parochiæ limites non comprehenditur habeat. Juxta etiam communes leges clarum eſt, quod nemo jus hæreditarium in decimis habeat, niſi ſit Eccleſiaſticus, aut Eccleſiaſticam habeat juriſdictionem.

Rex ratione ſupremæ ſuæ Eccleſiaſticæ Juriſdictionis præſentabit ad liberas capellas ſuas (in defectu Decani &c.) per lapſum. Et *Fitzherbertus* dicit, quod in hac cauſa

King had done of antient Time to the Archdeacon of (*a*) Richmond. (*a*) Co. Lit. 134. a.

All (*b*) Religious or Eccleſiaſtical Houſes, whereof the King was Founder, are by the King exempt from ordinary Juriſdiction, and only viſitable, and corrigible by the King's Eccleſiaſtical Commiſſion. 20 E. 3. Excom. 9. (*b*) Dav. 46. b. 16 E. 3. 11. Tit. Bre. 660. 21 E. 3. 60. 6 H. 7. 14. F. N. B.

The Abbot of Bury in Suffolk was exempted from Epiſcopal Juriſdiction by the King's Charter. 20 E. 3. Tit. Excom. 6.

The King preſented to a Benefice, and his Preſentee was diſturbed by one that had obtained Bulls from Rome, for which Offence he was condemned to perpetual Impriſonment, &c. 21 E. 3. 40.

Tithes (*c*) ariſing in Places out of any Pariſh the King ſhall have, for that he having the ſupreme Eccleſiaſtical Juriſdiction, is bound to provide a ſufficient Paſtor that ſhall have the Cure of Souls of that Place which is not within any Pariſh; And by the common Laws of England it is (*d*) evident, that no Man unleſs he be Eccleſiaſtical, or have Eccleſiaſtical Juriſdiction can have Inheritance of Tithes. 22 E. 3. lib. Aſſ. pl. 75. (*c*) Seld. de Decimis 365. (*d*) Co. Lit. 139. a. 2 Co. 44. a. Cr. El. 512.

The King ſhall preſent to his free Cappels (in Default of the Dean) by lapſe in Reſpect of his ſupreme Eccleſiaſtical Juriſdict. And Fitzh. ſaith, that the King in that Caſe doth pre- 27 E. 3. f. 84. F. N. B. f. 34. f.

(a) Plowd. 498. b.

30 E. 3. lib. Aſſ. pl. 19. 12 H. 4. 16. 14. H. 4. 14. 8 H. 6. fol. 3. 35 H. 6. 42. 28 H. 6. 1. 7 E. 4. 14 12 E. 4. 16. F. N. B. f. 64. F. Vid. 9 E. 4. f. 3. Hereafter f. 11. It ought to be determined in the Eccleſiaſtical Courts in England.

Poſt. f. 23. b. 26. a.

prefent by Lapſe as (a) Ordinary.

An Excommunication under the Pope's Bull, is of no Force to diſable any Man within England: And the Judges ſaid, that he that pleadeth ſuch Bulls though they concern the Excommunication of a Subject, were in a hard Caſe, if the King would extend his Juſtice againſt him. If Excommunication being the extream and final End of any Suit in the Court at Rome, be not to be allowed within England; It conſequently followeth, that by the antient Common Laws of England, no Suit for any Cauſe though it be Spiritual, riſing within this Realm, ought to be determined in the Court of Rome; Quia fruſtra expectatur eventus cujus effectus nullus ſequitur: And that the Biſhops of England are the immediate Officers and Miniſters to the King's Courts.

ſa Rex ut ordinarius per lapſum præſentat.

Excommunicatio ſub bulla Papali, nullam habet vim reddendi aliquem incapacem intra Angliam, & Judices pronunciarunt, quod qui ejuſmodi Bullas ad cauſam ſuam ſtabiliendam producit, quanquam erant ad ſubditum excommunicandum, male cum illo ageretur, ſi Rex ſummo jure ageret Si excommunicatio, quæ ſumma & ſuprema eſt cenſura & coertio in Curia Romana intra Angliam non ſit approbanda, ex conſequentia colligitur, quod per antiquas communes Angliæ leges, nulla controverſia ulla de cauſa, licet illa ſpiritualis, intra regnum exorta in Romana Curia dijudicari debeat; *Quia fruſtra expectatur eventus, cujus effectus nullus ſequitur*: Quodque etiam Angliæ Epiſcopi ſunt immediati officiarii & miniſtri ad curiam Regis.

31 E. 3. Tit. Excom. 6.

In an Attachment upon a Prohibition, the Defendant pleaded the Pope's Bull of Excommunication of the Pl. The Judges demanded of the Defendant, if he had not the Certificate of ſome Biſhop within the Realm, teſtifying this Excommunication: To whom the Counſel of the Defendant anſwered, that he had not, neither was it as he ſuppoſed neceſſary: For that the Bulls of the Pope under Lead were notori-

In apprehenſione ex prohibitione, defendens quidam Bullam Papalem excommunicationis contra Actorem ſive Querentem produxit: Judices defendentem rogarunt, ſi certificationem ab aliquo intra Regnum Epiſcopo ad excommunication' teſtificand' haberet: Defendentis advocati reſponderunt, quod non haberet, neque neceſſarium eſſe exiſtimarunt ut haberet quia Bulla Papalis ſub Sigillo

gillo plumbeo ſatis ſuper-
ue nota erat, & omnibus
onſtaret. Verum adjudi-
tum erat Bullas Papales
inime ſufficientes eſſe,
ia Curia Regia nullam
bere debet rationem ali-
jus excommunication' ex-
Regnum factæ, & igitur
Curiæ regula, Querens
de ſuo jure non erat ex-
uſus.

Reges ſacro oleo uncti, ſunt ſpiritualis juriſdictionis capaces.

Cum Prior Regi debitor
, & Decimas ab alia per-
na ſpirituali accipere de-
t, in ejus eſt electione de
btractione Decimarum,
l in Curia Eccleſiaſtica,
l in Scaccario in jus vo-
re, cum & perſonæ & res
dem fuerunt Eccleſiaſti-
: Quandoquidem enim
s meditate ad Regem
ectat, ille in Scaccario per-
de ac in Curia Eccleſi-
ica in jus vocare poteſt,
ibi jus de Decimis deci-
tur. *Fitzherbertus* etiam
ſuo Nat. Bre. fol. 30. af-
mat, quod ante ſtatutum
Edwardi 3. cap. 7. jus
Decimis decidendum e-
in Curiis temporalibus
o arbitrio agentium; Et
r illud ſtatutum ſancitum
, ut in Eccleſiaſtica Cu-
deciderentur, & tem-
ralis Curia inde erat ex-
ſa. Curiæ etiam quorun-
m Maneriorum Regis, &
orum Magnatum, ſupe-
oribus ſæculis teſtamenta
obarunt: & ex 11 H. 7.

ous enough: But it was adjudged that they were not ſufficient, for that the Court ought not to have regard to any Excommunication *(a)* out of the Realm. And therefore by the Rule of the Court the Plaintiff was not thereby diſabled.

(a) Antea 14. b. Co. Lit. 134. a. F. N. B. 64. f.

Reges *(b)* ſacro oleo uncti, ſunt ſpiritualis Juriſdictionis capaces.

(b) 2 Rol. Rep. 451. Dav. 4. a. 33 E. 3. Tit. Aid Roy 103.

Where a Prior is the Kings Debtor, and ought to have Tithes of another Spiritual Perſon, he may chooſe either to ſue for Subtraction of his Tithes in the Eccleſiaſtical *(c)* Court, or in the Exchequer, and yet the Perſons and Matter alſo was Eccleſiaſtical: For ſeeing the Matter by a Mean concerneth the King, he may ſue for them in the Exchequer as well as in the Eccleſiaſtical Court, and there ſhall the Right of Tithes be determined. And Fitzherherbert in his Na. Bre. fol. 30. holdeth, that before the Statute of 18 Edw. 3. cap. 7. that Right of Tithes were determinable at the Temporal Courts at the Election of the Party; And by that Statute aſſigned to be determined in the Eccleſiaſtical Court, and the Temporal Court excluded thereof: And the Courts of divers Manors of the Kings, and of other Lords in antient Times had the *(d)* Probates of laſt Wills and Teſtaments, and it appeareth by 11 H. 7.

38 Aſſ. pl. 20.

(c) Co. Lit. 149. a. 2 Co. 44. a.

(d) Perk. ſect. 486. 9 Co. 37. b. 2 Rol. 217. 2 Inſt. 231, 488. 11 H. 7. 12. b. Br. Teſtament 27. 1 Sid. 46. Vaug. 207. Seld. Juriſd. de Teſtamentis 9, 10.

See the Statute of 15 E. 3. c. 6. 31 E. 3. c. 11.

H. 7. fol. 12. That Probate of Teſtaments did not appertain to the Eccleſiaſtical Court, but that of late Time they were determinable there: So as of ſuch Cauſes, and in ſuch Manner as the Kings of the Realm by general Conſent and Allowance have aſſigned to their Eccleſiaſtical Courts, they have Juriſdiction by Force of ſuch Allowance.

fol. 12. liquet, probationem teſtamentorum ad Curias Eccleſiaſticas non ſpectaſſe, ſed non ita pridem ibi fuiſſe decidendam; adeo ut in ejuſmodi cauſis, & eo modo, quo regni hujus Reges unanimi conſenſu & approbatione Eccleſiaſticis Curiis attribuerunt, virtute ejuſdem approbationis juriſdictionem habeant.

38 Lib. Aſſ. pl. 22.

The King did by his Charter tranſlate Canons ſecular, into regular and religious Perſons, which he did by his Eccleſiaſtical Juriſdiction, and could not do it unleſs he had Juriſdiction Eccleſiaſtical.

Rex ſuo diplomate Canonicos ſeculares, in regulares & religioſas perſonas tranſtulit, quod ex jurisdictione ſua Eccleſiaſtica fecit, & minime facere potuerat, niſi juriſdictionem habuiſſet Eccleſiaſticam.

46 E. 3. Tit. Præmun. 6.

The Abbot of Waltham died in the 45 Year of E. 3. and one Nicholas Morris was elected Abbot, who for that the Abbey was exempt from ordinary Juriſdiction, ſent to Rome to be confirmed by the Pope: And becauſe the Pope by his Conſtitutions had reſerved all ſuch Collations to himſelf, he did recite by his Bull, that he having no regard to the Election of the ſaid Nicholas, gave to him the ſaid Abbey, and the Spiritualities and Temporalities belonging to the ſame, of his Spiritual Grace, and at the Requeſt (as he fained) of the King of England. This Bull was read and conſidered of in Council, that is, before all the Judges of England, and it was reſolved by them

Abbas Walthamiæ dictus obiit 45 E. 3. & quidam Nicholaus Morris erat Abbas electus, qui quoniam Abbatia illa ordinaria jurisdictione exempta erat, Romam miſit ut a Papa confirmaretur. Quoniam autem Papa ex ſuis conſtitutionibus omnes id genus collationes ſibi reſervaſſet, in Bulla ſua recitavit, Quod ipſe nulla habita ratione ad electionem præd' Nicholai dedit ipſi præd' Abbatiæ cum ſpiritualibus & temporalibus ad eandem ſpectantibus ex gratia ſua ſpirituali, ad petitionem (uti finxit) Regis Angliæ. Hæc Bulla in Concilio, id eſt, coram univerſis Angliæ Judicibus lecta & perpenſa erat,

illis univerſis pronuncia-
m eſt, hanc Bullam eſſe
ntra leges Angliæ, & Ab-
tem pro impetratione e-
ſd' eſſe in Regis miſericor-
ia, unde omnes ejus poſ-
ſſiones in Regis manus
nt captæ, ut plenius in ea-
em cauſa apparet.

Cum Abbas Weſtmona-
erii haberet priorem &
nventum regularem in
ge mortuum, Rex tamen
o diplomate corporatio-
em illam diviſit, & fecit
iorem & conventum cor-
us diſtinctum & capax, qd'
x ſe in jus & vocare, & vo-
ri poterat.

Parliamento anno Regis
Edwardi tertii 25. habito,
ncitum eſt totius Parlia-
amenti conſenſu, qd' tam
li qui proviſiones Romæ
rocurarent, quam qui eas
requerentur, non eſſent in
egis protectione, ſed eo lo-
o quo hoſtes Regis habe-
entur, & qui contra ejuſ-
modi proviſores offenderint,
ontra omnes excuſarentur,
nunquam inde in crimen
ocarentur, aut moleſtaren-
ur. Ex qua lege, quilibet e-
ſmodi proviſorem legiti-
e tanquam profeſſum Re-
a, & patriæ hoſtem tollere
oterat, tanta & tam atro-
a hæc habebantur flagitia.
Poſtmodo eod' *Edwardi*
rtii 25. an. in pleno Parlia-
ento demonſtratum erat
all, that this Bull was againſt the Laws of England, and that the Abbot for obtaining the ſame was fallen into the K.'s Mercy, whereupon all his Poſſeſſions were ſeiſed into the K.'s Hands, as more at large by the ſaid Caſe appeareth.

Where the Abbot of Weſtminſter had a Prior and Covent who were regular and moſt in Law, yet the K. by his Charter did divide that Corporation, and made the Prior and Covent a diſtinct and capable Body, to ſue and be ſued by themſelves. 49 E. 3. lib. Aſſ. pl. 8.

At (a) a Parliament holden in the xxv. Year of K. Edward the Third: It was enacted by conſent of the whole Parliament, that as well they that obtained Proviſions from Rome, as they that put them in Execution, (b) ſhould be out of the K.'s Protection: And that a Man might do with them, as with the Enemies of the K. and he that offended againſt ſuch Provisors in Body, Goods, or other Poſſeſſions, ſhould be excuſed againſt all People, and ſhould never be impeached or griev'd for the ſame. By which Law every Man might lawfully kill ſuch an Offender, as a com. Enemy againſt the K. & his Country, ſo hainous were ſuch Offences then holden. Statute de 27 Ed. 3. de proviſoribus. (a) 3 Co. 76. a. 1 Jon. 160.

Afterwards in the ſame xxv. Year of K. Edward the Third, It was in open Parliament Statut. de 25 E. 3.

by the grievous Complaints of all the Commons of this Realm, shewed that the Grievances and Mischiefs aforesaid did daily abound, to the great Damage and Destruction of all this Realm, more than ever were before, viz. That of late the Bp. of Rome by Procurement of Clerks and otherwise, had reserved and did daily reserve to his Collation, generally and specially, as well Archbishricks, Abbies and Priories, as all other Dignities, and other Benefices of Engl. which were of the Advowry of People of holy Church, and gave the same as well to Aliens as to Citizens, and taketh of all such Benefices the first fruits, and many other Profits, and a great Part of the Treasure of the Realm was carried away and dispended out of the Realm, by the Purchasors of such Graces; and also by such Privy Reservations, many Clerks advanced in the Realm by their true Patrons, which peaceably holden their Advancements by long Time, were suddenly put out. Whereupon the said Commons did pray their said Soveraign Lord the King, that sithence the Right of the Crown of Engl. and the Law of the said Realm was such, that upon the Mischiefs and Damages which happened to his realm, he ought and was bound of the Accord of his said people, therefore to provide reme-

communitatis hujus regni gravissimis querelis, quod prædicta gravamina & detrimenta, ad hujus regni maximum damnum & subversionem indies magis magisque quam unquam antea ingravescerent, viz. Quod nuper pontifex romanus clericis procurantibus, & aliis, tam archiepiscopatus, abbatias, ac prioratus, quam reliquas omnes dignitates, & Angliæ beneficia, quæ ad jus cleri spectarent, sibi, & quotidie reservaret ad suam collationem generatim & speciatim, & ead' tam exteris, quam indigenis conferet, & ex ejusmodi beneficiis primitias & multa alia emolumenta sibi attraheret, unde per ementes ejusmodi gratias expectativas, magna vis opum ex hoc regno deportaretur, extraque regnum distraheretur, ac etiam hujusmodi occultis reservationibus quamplurimi clerici per indubitatos patronos promoti, qui pacifice diu sua beneficia tenuerant, ex improviso erant exturbati. Hinc prædicta communitas regem supplex rogavit, ut quandoquidem jus coronæ Angliæ, & lex Angliæ ejusmodi erat, ut ipse deberet & obligatus esset, ex consensu communitatis suæ, damnis & detrimentis quæ in regno acciderunt, prospicere legemq; ferre, ad dam-

Note.

na

na & detrimenta quæ inde profluxerunt evitanda, ut sibi placeret his malis remedium adhibere. Præfatus Rex Edwardus tertius prospiciens hæc damna & detrimenta, & ad statutum tempore avi sui *Edwardi primi*, & causas in eo comprehensas respiciens, quod statutum vim suam habet,& nunquam ulla in parte antiquatum erat aut abrogatum: Et quandoquidem ille jurejurando obstrictus erat, ad idem ut regni legem observandum, etsi quadam incuria, & negligentia quidam contra ierant: Querelas etiam communitatis suæ in diversis Parliamentis prius habitis perpendens, nihil magis in votis habuit, quam magnis illis damnis & detrimentis, quæ inde acciderant, & quotidie Ecclesiæ Anglicanæ accidunt, consulere & mederi, assensu procerum & communitatis regni, ad Dei honorem, Ecclesiæ anglicanæ, & totius regni sui emolumentum, ordinavit & sanxit, quod libera electio archiepiscoporum,episcoporum, & reliquarum dignitatum, & beneficiorum electivorum in anglia jam inde permaneret eo modo, quo per Regis progenitores fuerit concessa, & aliorum antecessores fundata. Quod

dy and Law, for the avoiding the Mischiefs and Damage which thereof came, that it might please him thereupon to ordain remedy. The said King E. III. seeing the mischiefs and damages before named, and having regard to the Statute made in the Time of his Grandfather K. Ed. I. and to the causes contain'd in the same, which Stat. holdeth always his force,and was never defeated nor annulled in any point: and forasmuch as he was bound by his Oath to see the same to be kept as a law of this Realm, tho' that by sufferance and negligence it had been sithence attempted to the contrary,also having regard to the grievous complaints made to him by his people in divers his Parliaments holden heretofore,willing to ordain remedy for the great damage and mischiefs which had happened, and daily did happen to the Church of England by the said cause, by the assent of all the great men,and the commonalty of the said realm, to the honour of God, and profit of the said Church of Engl. and of all his realm did order and establish, that the free election of Archbishops, Bishops, and all other dignities and benefices elector y in England, should hold from thencefoth in the manner as they were granted by the King's progenitors,

Antea 13. b.

Nota.

Vide 10 E. 3. fol. 1 & 2.

and founded by the Anceſtors of other Lords: And that all Prelates, and other People of the holy Church, which had Advowſons of any Benefices of the K.'s Gift or of any of his Progenitors, or of other Lords and Donors, to do Divine Service and other Charges thereof ordained, ſhould have their Collations and Preſentments freely, in the Manner as they were infeoffed by their Donors. And in Caſe that Reſervation, Collation or Proviſion be made by the Court of Rome, of any Archbiſhoprick, Biſhoprick, Dignity, or other Benefice in Diſturbance of the Election, Collations, or Preſentations aforenamed: That at the Time of the Avoidance, that ſuch Reſervations, Collations, and Proviſions ought to take Effect, the ſaid K. Edw. III. and his Heirs ſhould have and enjoy for the ſame Time Collations to the Archbiſhopricks and other Dignities elective, which be of his Advowry, ſuch as his Progenitors had before that free Election was granted, ſithence that the Elections were firſt granted by the K.'s Progenitors, upon a certain Form and Condition, as to demand Licence of the King to chuſe, and after the Election to have his royal Aſſent, and not in other manner: Which Conditions not kept, the King ought by reaſon to reſort to his firſt Nature, as

omnes prælati, & alii ordinis eccleſiaſtici, qui jus patronatus habuerunt in ullis beneficiis ex dono Regis, aut alicujus progenitorum ejus, vel aliorum magnatum ad rem divinam celebrandam, & alia quæ ad eandem pertinent, collationes atque nominationes libere haberent, eo modo quo a donatoribus data, & donata fuerint: Quod ſi reſervatio, collatio, vel proviſio ullius archiepiſcopatus, epiſcopatus, dignitatis, vel alterius cujuſpiam beneficii per curiam romanam facta fuerit, ad diſturbandum electiones, collationes, aut nominationes antedictas, qd' quandocunq; vacaverint, & ejuſmodi reſervationes, collationes, proviſiones, effectum ſuum ſortiri debuerint, præd' Rex Edw. 3. & hæredes haberent & fruerentur iiſdem collationibus ad archiepiſcopatus & alias dignitates electivas, quæ ſunt ex patronatus ſui jure, cujuſmodi jus progenitores ejus habuerant priuſquam ejuſmodi libera electio conceſſa fuiſſet: Quandoquidem electiones ſub certa forma & conditione a Regis progenitoribus conceſſæ fuiſſent, viz. ut eligendi venia a rege peteretur, & poſt electionem regius aſſenſus adhiberetur & non alio quovis modo: Quæ condition cum minime obſervatæ

ervatæ fuerint, Rex recte
d primam inſtitutionem
edire debet, ut plenius ex
oſo ſtatuto clariſſime patet.
Anno 27. ejuſdem Re-
is graviſſima querela ab
ujus regni magnatibus, &
ommunitate regi in par-
amento exhibita fuit, qd'
lurimi ſubditorum ex reg-
o evocati eſſent ad re-
ondendum de rebus qua-
m cognitio ad curiam
egis ſpectabat, & quod
dicia data in eadem curia
aliis curiis impedita &
firmata eſſent, in Regis
ronæq; ſuæ & univerſi po-
uli ſui præjudicium & ex-
ereditationem, atque eti-
n in communis legis ejuſ-
em regni, quæ ſemper in
u fuerat, ſubverſionem:
nde magna & matura de-
eratione magnatum, &
iorum ex ejus prædicto
nſilio aſſenſum & concor-
tum eſt per regem, mag-
tes, & communitatem,
od omnes populi ſub
egis fide, cujuſcunque lo-
& conditionis qui ali-
em extra regnum in jus
carent de cauſa cujus
gnitio ad curiam Regis
ectaret, vel de rebus de
ibus judicia in Regis cu-
data fuerint, aut qui jus
um perſequerentur in ulla
a curia, ad infringenda
irmanda & reſcindenda
dicia in Regis curia data,
nam *Præmunire* incur-
e deberent, ut ex eodem
tuto videre eſt.

by the ſaid Act more at large appeareth.

In the 27. Year of the Reign of the ſame K. it was grievouſly complained to the King in a Parliament then holden, by the great Men and Commons of the Realm, how that divers of the People were and had been drawn out of the Realm, to anſwer to Things whereof the Conuſance pertained to the K.'s Court: And alſo that the Judgments given in the ſame Court, were impeached in other Courts, in Prejudice and Diſheriſon of the K. and his Crown and of all the People of his ſaid Realm, and in the Undoing and Deſtruction of the Com. Law of the ſame Realm at all Times uſed: Wherefore, upon good Deliberation had with the great Men and others of his ſaid Council, it was aſſented and accorded by the K. and the great Men and Commons aforeſaid, that all the People of the K.'s Allegeance of what Condition that they be, which ſhould draw any out of the Realm, in Plea whereof the Conuſance pertained to the King's Court, or of Things whereof Judgments were given in the King's Court, or which did ſue in any other Court to defeat or impeach the Judgments given in the K.'s Court ſhould incur the Danger of Præmunire, as by the ſaid Act appeareth. Statorum de 27 Ed. 3.

28 Ed. 3. c. 1 & 2.

To nourish Love, Peace, and Concord, between holy Church and the Realm, and to appease and cease the great Hurt and perils, and insupportable Losses and Grievances that had been done and happened in Times past, and that should happen hereafter, if the Thing from thenceforth be suffered to pass, because of personal Citations and other that be passed before this Time, and commonly did pass from Day to Day out of the Court of Rome, by feigned and false Suggestions and Propositions, against all manner of Persons of the Realm, upon Causes whose Cognisance and Final discussing pertained unto the King and his royal Court: And also of Impetrations and Provisions of Benefices and Offices of holy Church, pertaining to the Gift, Presentation, Donation, and Disposition of the K. and that other lay Patrons of this Realm as of Churches, Chapels, and other Benefices appropriated to Cathedral Churches, Abbies, Priories, Chauntries, Hospitals, and other poor Houses, and of other Dignities, Offices, and Benefices occupied in Times past, and presented by divers and notable Persons of the said Realm: For which Causes, and dispensing whereof, the good ancient Laws, Usages, Customs, and Franchises of the said Realm, had been and were greatly appaired, blemished &

Ad mutuum amorem, pacem & concordiam, intra sacrosanctam Ecclesiam, & regnum fovendam & confirmandam, nec non ad magna damna, detrimenta intolerabilia, & gravamina amovenda, sedanda, & tollenda, quæ superioribus temporibus illata fuerant & acciderant, & postea accidere possent (si res quæ cœpit pergere toleretur) ex citationibus personalibus, & aliis, quæ & superioribus temporibus provenerunt, & indies proveniunt ex curia romana per fictas & falsas suggestiones contra quaslibet hujus regni personas, de causis quarum cognitio & finalis discussio, ad regem & regiam ipsius curiam spectinet: Ac etiam ex beneficiorum, & ecclesiasticorum officiorum impetrationibus, & provisionibus quæ ad præsentationem, donationem, & dispositionem Regis spectant, & ad laicos in hoc regno patronos laicos, utique ecclesiarum, capellarum, & aliorum beneficiorum ecclesiis cathedralibus, abbatiis, prioratibus, Hospitalibus adnexorum, aliarumque dignitatum, officiorum, & beneficior' quæ jam antea tenebantur, & ad quas præsentationes factæ fuerint per quosdam eximios hujus regni viros: Quibus de causis, & earundem di-

per

pensationibus, cum bonæ & antiquæ leges, consuetudines, & libertates ejusdem regni fuissent imminutæ infirmatæ, & confusæ, corona supremi Domini Regis accisa, ejusque persona infamia aspersa, thesaurus & opes regni deportatæ, incolæ & subditi ad paupertatem redacti & divexati, beneficia sanctæ Ecclesiæ direpta & vastata, divinus cultus, hospitalitas, eleemosynæ, & charitatis opera sublata, regni communitas, & laboribus confecta, & bonis exhausta.

Rex in Parliamento Westm' habito Octob' Hill' anno 38. regni, populi sui commodis, & tranquilitati consulens, quem placida pace & tranquillitate tueri in votis habuit, & rempublicam administrare secundum regni leges, consuetudines & libertates, ut jurejurando cum inauguraretur obstrictus erat; progenitorum suorum vestigiis insistens, qui suis temporib' salutares leges, ordinationes, & provisiones, contra prædicta gravamina & pericula tulerunt; quas leges, ordinationes, & provisiones singulas, & alias suo tempore, potissimum anno regni sui 25 & 27. latas, Rex assensu, expressa sententia, & unanimi consensu ducum, comitum, baronum, & communitatis hujus regni atque aliorum omnium ad quos hæc spectarunt

confounded, the Crown of their Soveraign Lord the K. minished, and his Person falsly defamed, his Treasury and Riches of the Realm carried away, the Inhabitants and Subjects of the Realm impoverished and troubled, the Benefices of holy Church wasted and destroyed, Divine Services, Hospitalities, Alms-Deeds, and Works of Charity withdrawn and set apart, the Commons and Subjects of the Realm in Body and Goods consumed.

The King at his Parliament holden at Westminster in the Utas of S. Hillary the xxxviii. Year of his Reign, having regard to the Quietness of his People, which he chiefly desired to sustain in Tranquility and Peace, to govern according to the Laws, Usages, and Franchises of his Land, as he was bound by his Oath made at his Coronation, following the Ways of his Progenitors, which for their Time made certain good Ordinances and Provisions against the said Grievances and Perils: Which Ordinances and Provisions, and all the other made in his Time, and especially in the 25 and 27 Years of his Reign, the K. by the Assent and Express Will and Concord of the Dukes, Earls, Barons, and the Commons of this Realm, and of all other whom these Things touched, by good and meet Deliberation and Advisement, did approve, accept,

Stat. de 38 E. 3. cap. 3.

and confirm, as by the said Act appeareth.

But those which should execute the said good Laws against such capital Offenders, were cursed, reproved, and defamed, by such as maintained the usurped Jurisdiction of the Bishop of Rome, against which an especial Act of Parliament was made by the King and his whole Realm, prohibiting thereby such Defamations and Reproofs.

salutari & matura deliberatione & consultatione approbaverunt, acceptaverunt, & confirmaverunt, ut ex eodem statuto omnibus manifestum & testatum est. Veruntatem illi qui salutares illas leges contra tam nefarios delinquentes exercerent, diris erant devoti, maledictis violati, & in calumniam rapti ab illis, qui usurpatam pontificis romani jurisdictionem propugnabant. Contra quos speciali statuto parliamentario, per regem & universum regnum facta ejusmodi maledicta, calumniæ, & defamationes prohibita fuerunt.

King Richard the Second.

Regnante Richardo Secundo.

12 R. 2. Tit. Jurisdiction 18.

AGainst an Incumbent of a Church in England, another sueth a Provition in the Church of Rome, and there pursueth until he recovereth the Church against the Incumbent, and after brought an Action of account against him, as Receiver of divers Sums of Money (which in Troth were the Oblations and Offerings which the Incumbent had received:) And the whole Court was of Opinion against the Plaintiff, and thereupon he became Nonsuit.

REctorem Ecclesiæ in Anglia alter in jus vocavit per provisionem in curia romana, & ibidem sectam suam adeo prosecutus est, quousque in curia romana sententia lata fuit contra rectorem: Et postea actionem suam de compoto contra eundem rectorem, quasi retentorem diversarum pecuniarum summarum producit: Quæ pecuniæ erant oblationes & obvention' pro rectorem receptæ, &c. In hoc casu tota curia sententiam contra querentem in actione de compoto prosequebat, super quo querens ulterius non prosecutus est, sed causa cecidit.

Par

Parliamentaria authori-
ate hoc anno declaratum
erat, qd' Angliæ corona om-
nibus temporibus adeo li-
bera fuit, ut nulli regno ſub-
lita ſed immediate Deo, &
non cuivis alteri ſubjecta fu-
erit, quodque eadem, quan-
um ad majeſtatem ejuſdem
pectat, in nulla re Romano
ontifici ſubmitti debeat,
nec leges aut ſtatuta hujus
Regni per ipſum antiquari,
ut imminui, ad perpetuam
Regis ejus coronam, & ma-
eſtatis ejus, & totius Reg-
ni ſubverſionem. Ad hæc
Regni communitas in eo
parliamento affirmanter af-
everavit, quod quæ Ro-
manus pontifex attentaverit,
unt manifeſto contra Regis
coronam, & majeſtatis jura,
emporibus omnium ejus
progenitorum uſitata & ap-
probata: Quapropter & ip-
i, & univerſa fidelis com-
munitas ejuſdem regni, a
rege, ejus corona, & maje-
ſtate ſtarent in cauſis præ-
fatis, & aliis quibuſcunque
ſuſceptis contra ipſum, ipſi-
us coronam, & majeſtatem,
in ſingulis uſque ad mor-
tem. Regem præterea ora-
bant, & juſtitiæ nomine
obſecrabant, ut ſeorſim ex-
aminaret ſingulos proceres
in parliam', tam ſpirituales,
quam temporales, & omnes
parliamenti ordines, quid
in prænominatis ſenti-
rent, quæ tam aperte Re-
giæ coronæ adverſabantur,

It is declar'd by that Parliament, that the Crown of Engl. hath been ſo free at all Times, that it hath been in Subjecti-on to no Realm, but immedi-ately ſubject to God, and none other, and that the ſame ought not in any Thing touching the Regalty of the ſame Crown, be ſubmitted to the Bp. of Rome, nor the Laws & Stat. of this Realm by him fruſtrated or defeated at his Will, to the perpetual De-ſtruction of the K. his Sove-reignty, Crown, and Regalty, and of all his Realm. And the Commons in that Parliam. affirmed, that the Things at-tempted by the Bp. of Rome, be clearly againſt the King's Crown and his Regalty, uſed and approved in the Time of all his Progenitors: Where-fore they and all the leige Commons of the ſame Realm, would ſtand with the King, and his ſaid Crown, and his Regalty, in the Caſes afore-ſaid, and in all other Caſes attempted againſt him, his Crown, and his Regalty, in all Points to live and to die. And moreover they did pray the King, and him required by Way of Juſtice, that he would examine all the Lords in the Parliament, as well Spiri-tual as Temporal ſeverally, and all the States of the Parliament, how they thought of the Caſes afore-ſaid, which were ſo openly a-gainſt the King's Crown and in

Statutum de 16 R. 2. cap. 5.

Nota.

in derogation of his Regalty, and how they would ſtand in the ſame Caſes with the King, in upholding the Rights of the ſaid Crown and Regalty: whereupon the Lords temporal ſo demanded, did anſwer every one by himſelf: That the Caſes aforeſaid were clearly in derogation of the King's Crown and of his Regalty, as it was well known, and had been of long Time known; and that they would ſtand with the ſame Crown, and Regalty in thoſe Caſes eſpecially, and in all other Caſes which ſhould be attempted againſt the ſaid Crown and Regalty in all Points, with all their Power. And moreover if was demanded of the Lords Spiritual there being, and the Procurators of others being abſent, their Advice and Will in all thoſe Caſes, which Lords, that is to ſay, the Archbiſhops, Bps. and other Prelates being in the Parliam. ſeverally examined, making Proteſtations, that it was not their Mind to deny or affirm that the Bp. of Rome might not excommunicate Bps. nor that he might make tranſlation of Prelates after the Law of holy Church, anſwered and ſaid, that if any Executions or Proceſſes made in the King's Court, as before were made by any, and Cenſures of Excommunications be made againſt any Biſhop of Engl. or any other of the

& majeſtati Regiæ derogabant; Quomodo etiam in prædictis cauſis cum rege concurrerent in coronæ & majeſtatis jure ſuſtentando, qua de re domini temporales interrogati ſinguli ſeorſim reſponderunt, qd' cauſa præd' manifeſto tenderent in Regiæ coronæ & ejuſdem majeſtatis derogationem, ut explorate cognitum eſt, et jam diu cognitum erat: Quodque ipſi omnibus viribus firmiter ſtarent ab eadem corona & majeſtate in cauſis potiſſimum prædictis & omnibus aliis, quæcunque contra eandem coronam & majeſtatem ſuſciperentur. Domini ſpirituales ibidem præſentes, & procuratores aliorum qui aberant, interrogati erant, quid ſentirent & fieri vellent in cauſis illis omnibus: Qui domini viz. archiepiſcopi, epiſcopi & cæteri prælati in parliamento ſeorſim examinati proteſtationibus prius factis, quod non erat ipſis in animo negare aut affirmare, pontificem Romanum non poſſe epiſcopos excommunicare, aut prælatos transferre juxta ſanctæ Eccleſiæ leges, reſponderunt & dixerunt, quod ſi ullæ executiones vel proceſſus in curia Regis, ut antea, ab ullo factæ fuerint, & excommunicationis cenſuræ contra ullum Angliæ epiſcopum, vel alium quemv[illegible]

fidelibus Regis ſubditis, uod ejuſmodi mandata ex- cuti fuerint. Præterea ſi llæ executiones ejuſmodi anſlationum aliquorum rælatorum prædicti Reg- i, qui regi & regno ſuo primis uſui erant & ne- eſſarii, factæ fuiſſent; el ſi prudentes ex ejus oncilio evocati ſint & onge a regno abducti ſine ſſenſu ejus, & contra quam oluerit, ita quod opes & heſaurus regni imminue- entur, ea omnia eſſe con- ra Regem ejuſque coro- am, ut in prædicta peti- ione memorabatur: Simi- iter procuratores ſinguli er ſe de iiſdem rebus ex- minati, idem in nomine ominorum ſuorum reſpon- lerunt, perinde ac præfati piſcopi pronunciaverant, & eſponderant; Quodq; eti- m prædicti domini ſpiri- uales, & vellent & debe- ent ſtare a Rege in hiſce auſis, in corona ejus ſarta ecta conſervanda, & omni- bus aliis cauſis quæ ad co- onam ejuſque majeſtatem ſpectarunt, ut fide quam Regi debebant obligati fue- rant. Unde Rex ex aſſenſu præfato, & prædictæ com- munitatis petitione ſtatuit, & ſanxit, quod ſi quis in Romana curia vel alibi e- juſmodi tranſlationes, pro- ceſſus, excommunicationis ſententias, bullas, inſtru- menta, aut alia quæcunque quæ ad Regem dominum

King's leige People, for that they had made execution of ſuch Commandments: And that if any Executions of ſuch tranſlations be made of any Prelates of the ſame Realm, which Prelates were very profitable and neceſſary to the King, and to his ſaid Realm; or that his ſage Men of his Council and without his Aſſent, and againſt his Will be withdrawn and cloyned out of the Realm, ſo that the Subſtance and Treaſure of the Realm might be deſtroyed, that the ſame was againſt the K. and his Crown, as it was contained in the Petition before named: And likewiſe the ſame Procurators every one by himſelf examined upon the ſaid Matters, did anſwer and ſay in the Name and for their Lords, as the ſaid Biſhops had ſaid, and anſwered; And that the ſaid Lords Spiritual would and ought to ſtand with the King in theſe Caſes, lawfully in maintaining of his Crown, and in all other Caſes touching his Crown and his Regalty, as they were bound by their Allegiance. Whereupon the King by the Aſſent aforeſaid, and at the Prayer of his ſaid Commons, did ordain and eſtabliſh: That if any purchaſe or purſue, or cauſe to be purchaſed or purſued in the Court of Rome or elſewhere, any ſuch Tranſlations, Proceſſes, and Sentences of Excommunication, Bulles, Inſtruments, or a-

ny

ny other Things which touched the King their Lord, against him his Crown and his Regalty, or his Realm, as is aforesaid: And they which bring within the Realm, or them receive, or make thereof Notification, or any other Execution within the same Realm, or without; that they, their notorious Procurators, Maintainers, Fautors, and Counsellors, should be put out of the King's Protection, and their Lands and Tenements, Goods and Chattels forfeit to the King, and they be attached by their Bodies if they may be found, and brought before the King and his Council, there to answer to the Cases aforesaid; or that Process to be made against them by præmunire facias, as it is ordained in other Statutes of Provisors, and others which do sue in any other Court in derogation of the Regalty of the King, as by the said Act also appeareth.

Co. Lit. 130. a. F. N. B. 169. f.

suum spectarint, contra ipsum, ejus coronam & majestatem, vel ejus regnum, ut prædict' est, procuraverit, vel procurari fecerit: Et qui ea in regnum intulerint, vel receperint, vel publicaverint, vel quovis modo in prædicto regno, vel extra executi fuerint; quod ipsi, eorum notarii, procuratores, adjutores, fautores, consultores, Regis protectione excluderentur, & eorum terræ tenementa & bona in Regis potestatem redigerentur, ipsiq; si inveniri possint apprehenderentur, & coram Rege & ejus concilio sisterentur ad respondendum de prædictis, vel ut processus contra eos fieret per *præmunire facias*, ut sancitum est in aliis statutis de provisoribus & aliis qui in alia curia ad Regiæ dignitatis derogationem jus suum persequuntur, ut ex eodem statuto plenius patet.

In the Reign of King Henry IV.

Regnante Henrico quarto.

1 H. 4. fol. 9.

IT is resolved that the Pope's Collector, tho' he have the Pope's Bulls for that purpose, hath no Jurisdiction within this Realm, and there the Archbishops and Bishops, &c. of this Realm are called the King's spiritual Judges.

DEterminatum est quod collector papal', vigore alicujus bullæ, nullum intra hoc regnum habet authoritatem, & ibidem archiepiscopi, episcopi, &c. intra hoc regnum spirituales judices Regis nuncupantur.

F. N. B. 269. 2 H. 4. c. 15.

By the ancient Laws Ecclesiastical of this Realm, no

Per antiquas ecclesiasticas hujus regni leges, nemo hære-

ereticæ pravitatis, quæ cri-
en eſt læſæ majeſtatis con-
divinum numen, con-
nci poterat, niſi ab archie-
ſcopo & univerſo ejuſdem
ovinciæ clero, & inde ab-
ratus, poſtea de integro
nvictus & condemnatus a
ro ejuſdem provinciæ in
nodo generali, Sed ſta-
tum 2 *H.* 4. *c.* 15. authori-
em epiſcopo diœceſios
reticos condemnandi tri-
it: Quodq; ante ſtatutum
d hæreticus ſeculari bra-
o ad concremandum com-
tti non poterat, donec ſe-
l abjuraſſet, & in eandem
aliam hæreſin relapſus
ſſet: Unde luce clarius eſt,
od Rex conſenſu parlia-
nti direxit formulas pro-
lendi curiis eccleſiaſticis
hæreſios cauſis, & aliis
gis ſpiritualibus.

Papa non poteſt mutare
es Angliæ.

Judices pronunciarunt,
od ſtatuta quæ ad papa-
proviſiones, ad beneficia
eccleſiaſticorum homi-
n patronatu coercendas
ta fuerint, eo quod eccle-
ſtici in ſua juſta cauſa pa-
ibus proviſionibus con-
dicere non auderent: A-
o ut illa ſtatuta tantum
leges communes confir-
ndas fuerint ſancita.

Excommunicatio per pa-
n facta nullam vim in An-
a habet, & eadem ſignifi-

Man could be convicted of Hereſy, being High Treaſon againſt the Almighty, but by the Archbiſhop and all the Clergy of that Province, and after abjured thereupon, and after that newly convicted and condemned by the Clergy of that Province, in their general Council of Convocation: But the Stat. 2 H. 4. c. 15. doth give the Bp. in his Diocese Power to condemn an Heretick; And that before that Stat. he could not be committed to the ſecular Power to be burnt, until he had once abjured, and was again relapſed to that, or ſome other Hereſy; whereby it appeareth that the K. by Conſent of Parliament directed the Proceedings in the Eccleſiaſtical Court in Caſe of Hereſy, and other Matter more ſpiritual.

3 Inſt. 40.

This had Reſemblance to an Attainder of Treaſon, wherein there muſt be firſt an Indictment by one Jury, and a Conviction by another.

The Pope cannot alter the Laws of England.

11 H. 4. 37.

The Judges ſay, that the Statutes which reſtrain the Pope's Proviſions to the Benefices of the Advowſons of Spiritual Men, were made, for that the Spirituality durſt not in their juſt Cauſe ſay againſt the Pope's Proviſions: So as thoſe Statutes were made, but in Affirmance of the Common Laws.

11 H. 4. f. 69. 76.

Excommunication made by the Pope is of no Force in England, and the ſame being certified

14 H. 4. f. 14. Vide 30 E. 3. lib. Aſſ. pl. 19. before. Vide 13 E. Certificat. 6.

Vide 20 H. 6. 1. 35 H. 6. 42. 7 Ed. 2. 14. F. N. B. 54. F. Antea 15. b. Post. 26. b. 27. E.

fied by the Pope into any Court in England ought not to be allowed, neither is any Certificate of any Excommunication available in Law, but that is made by some Bishop of England, for the Bishops are by the Common Laws, the immediate Officers and Ministers of Justice to the King's Courts in Causes Ecclesiastical.

cata per papam alicui curiæ in Anglia admitti & approbari non debet, neq; alicujus excommunicationis ejusmodi significatio in lege vim habet, sed quæ per aliquem Angliæ episcopum facta fuit. Episcopi enim per leges communes sunt officiarii immediati, & Justitiæ ad ministri ad curias Regis in causis ecclesiasticis.

14 H. 4. 14.

If any Bp. do excommunicate any Person for a Cause that belongeth not unto him, the King may write unto the Bishop, and command him to assoyle and absolve the Party.

Si episcopus personam quamcunque excommunicaverit, pro causa ad eundem episcopum non spectante, Rex in eo casu scribat hujusmodi episcopo, ei præcipiens personam illam non excommunicationis sic innodatam absolvere.

Statute de 2 H. 4. cap. 3.

If any Person of Religion obtain of the Bishop of Rome to be exempt from Obedience regular or ordinary, he is in Case of Præmunire, which is an Offence as hath been said, contra Regem, coronam, & dignitatem suas.

Siqua religiosa persona pontifice Romano impetraverit, ut ab obedientia regulari eximatur, incurret *Præmunire*, quod est crimen jam antea dictum contra Regem, ejus coronam, & dignitatem.

Statute de 6 H. 4 cap. 1.

The Commons did grievously complain to the King, at the Parliament holden in the sixth Year of H. 4. of the horrible Mischiefs and damnable Customs which then were introduct of new in the Court of Rome, that no Person Abbot or other should have Provision of any Archbishop. or Bishop. which should be void, till he had compounded with the Pope's chamber, to pay great and excessive Sums of

In Parliamento habito anno 6 *Henrici quarti*, communitas Regni querelam gravissimam regi exhibuit de flagitiis atrocibus, & damnanda consuetudine tum temporis in Romanam curiam recens introductis, viz. Quod nulla persona, abbas, vel quivis alius, provisionem cujus archiepiscopatus, episcopatus vacantis haberet, priusquam cum

camera tranſegerit, ad
gnam vim pecuniæ per-
endam, tam pro primi-
ejuſdem archiepiſcopa-
vel epiſcopatus, quam
aliis minoribus penſita-
ibus in eadem curia:
quod ea vis pecuniæ, vel
or pars ejus præ mani-
ſolveretur, quæ pecu-
ſumma duplo vel triplo
minimum major erat
m quæ ſuperioribus
poribus in eadem came-
alibi, ratione ejuſmodi
viſionum ſolvi ſolebat,
e magna pars opum
us regni ad prædictam
am aſportata fuerat, &
ris temporibus aſportan-
effet, ad archiepiſcopa-
vel epiſcopatus intra
dictum regnum, & ali-
ntra Regis dominia ex-
riendos, ſi modo ſaluta-
emedium non adhibere-
Rex ad honorem Dei
nipotentis, tam ad dam-
& detrimenta regni,
m ad pericula anima-
ipſorum, qui ad archi-
copatus & epiſcopatus
regnum Angl', & alibi
Regis dominia extra
dictum regnum propul-
la, concilio & aſſenſu
natum regni ſui in Par-
iento ſtatuit & ſanxit,
d ipſi & ipſorum ſingu-
qui prædictæ cameræ
alibi, pro ejuſmo-
primitiis & ſervitiis
orem vim pecuniæ ſolve-
quam retroactis tempo-

Money, as well for the firſt Fruits of the ſame Archbiſhoprick or Biſhoprick, as for the other leſs Services in the ſame Court: And that the ſame Sums, or the greater Part thereof be paid before Hand, which Sums paſſed the Treble or the Double at the leaſt of that that was accuſtomed of old Time to be paid for the ſaid Chamber, and otherwiſe by the Occaſions of ſuch Proviſions, whereby a great Part of the Treaſure of this Realm had been brought and carried to the ſaid Court, and alſo ſhould be in Time to come, to the great impoveriſhing of the Archbiſhops and Bps. within the ſame Realm, and elſewhere within the K.'s Dominions, if convenient Remedy were not for the ſame provided. The King to the Honour of God, as well to eſchew the Damage of this Realm as the Perils of their Souls, which owen to be advanced to any Archbiſhopricks and Biſhopricks within the Realm of Engl. and elſewhere within the K.'s Dominions, out of the ſame Realm, by the Advice and Aſſent of the great Men of his Realm in the Parliament, did ordain and eſtabliſh, that they and every of them that ſhould pay to the ſaid Chamber or otherwiſe, for ſuch Fruits and Services greater Sums of Money than had been accuſtomed to be paid in old time paſt, they and

every

every of them should incur the Forfeiture of as much as they may forfeit towards the King, as by the said Act appeareth.

Statute de 7 H. 4. cap. 6.

No Person religious or secular, of what Estate or Condition that he were, by colour of any Bulls, containing Privileges, to be discharged of Tithes pertaining to Parish-Churches, Prebends, Hospitals, Vicarages, purchased before the first Year of King Richard the second, or after not executed, should put in execution any such Bulls so purchased, or any such Bulls to be purchased in Time to come, upon the Pain of a Præmunire, as by the said Act appeareth.

ribus solvi consuevit, ipsi ipsor' singuli incurrerent tr tam mulctam quantam ei Reg' mulctari possent, ut eod' statuto liquido consti

Nemo religiosus vel cularis cujuscunque loci conditionis, sub obte bullarum quarumcun cum privilegiis, ut exone rentur decimis ad Eccle parochiales, præbendas, spitalia, vicariasque spec tibus, (quæ quidem b impetratæ fuissent ante gis *Richardi Secundi* an primum, vel postea, & executioni mandatæ rant) exequeretur ulla jusmodi bullas ita impe tas, aut in futurum im trandas, sub pœna *Præ nire*, ut ex eodem sta clare elucet.

In the Reign of King Henry V.

Regnante Henr quinto.

Statute de 3 H. 5. cap. 4.

IN an Act of Parliament made in the third Year of King H. 5. It is declared, that whereas in the Time of King H. 4. Father to the said K. the 7 Year of his Reign, to eschew many Discords and Debates, and divers other Mischiefs which were likly to arise and happen because of many Provisions then made, or to be made by the Pope, and also of Licence thereupon granted by the said late King, amongst other Things; It was ordained and established,

IN statuto parliamen anno tertio Regis *Ha ci quinti* facto declar quod quandoquidem pore Regis *Henr.* 4. p ejusdem Regis, scilicet septimo regni ejusdem, evitanda multas conte nes, lites, & varia alia probabiliter tunc exor ex multis provisionibu papam tunc concessis concedendis, & etiam e centia inde per eun nuper Regem concess ter alia scitum & sanc

rat, quod nulla ejuſmodi
icentia aut facultas, ita
onceſſa ante prædict' ſta-
atum, aut poſtea conceden-
i, vim haberet ad confe-
endum aliquod beneficium
lenum, quod ſuum habuit
cumbentem die quo ejuſ-
odi licentia aut facultas
ta fuerit; nihilominus
verſæ perſonæ, quæ pa-
les proviſiones ad diver-
beneficia in Anglia &
lbi, & regiam licentiam
ſdem proviſiones exe-
endi habent, ſub prætex-
earundum proviſionum,
cultatum & acceptatio-
m prædictorum benefi-
orum nonnullos ſuis bene-
iis dolo malo excluſerunt
ibus longo jam tempore
viſi ſint, & incubuerint
collatione indubitatorum
tronorum ſpiritualium ip-
cogitato & debite facta,
eorundem incumbenti-
ſtatum enervandum &
turbandum. Rex ſum-
ſtudio ejuſmodi mala
opulſandi ſtatuit & ſan-
; quod omnes incumben-
cujuſlibet beneficii ec-
ſiaſtici, ex patronatu, col-
ione, vel præſentatione ec-
ſiaſticor' patronor', quie-
& pacifice iiſd' fruerен-
fine ulla inquietatione,
leſtatione, aut vexatione,
ejuſmodi proviſionum
ultatum & acceptatio-
m prætextu: Et qd' om-
licentiæ, ac facultates
ejuſmodi proviſionibus

that no ſuch Licence or Pardon ſo granted before the ſame Ordinance, or afterwards to be granted, ſhould be available to any Benefice full of any Incumbent, at the Day of the Date of ſuch Licence or Pardon granted: Nevertheleſs divers Perſons, having Proviſions of the Pope of divers Benefices in Engl. and elſewhere, and Licences Royal to execute the ſame Proviſions, have by Colour of the ſame Proviſions, Licences and Acceptations of the ſaid Benefices, ſubtilly excluded divers Perſons of their Benefices, in which they had been Incumbents by a long Seaſon of the Collation of the very Patrons ſpiritual, to them duly made to their Intent, to the utter Deſtruction and Enervation of the Eſtates of the ſame Incumbents. The King willing to void ſuch Miſchiefs, hath ordained and eſtabliſhed, that all the Incumbents of every Benefice of Holy Church, of the Patronage, Collation, or Preſentation of ſpiritual Patrons, might quietly and peaceably Enjoy their ſaid Benefices, without being inquieted, moleſted, or any ways grieved, by any Colour of ſuch Proviſions, Licences and Acceptations: And that all the Licences and Pardons upon and by ſuch Proviſions made in any Manner, ſhould be void, and of no Valour; and if any feel himſelf

grieved, molested or inquieted, in any wise from thencefor'th by any, by Colour of such Provisions, Licences, Pardons, or Acceptations, that the same Molestors, Grievors, or Inquietors, and every of them, have and incur the Pains and Punishments contained in the Statutes of Provisors before that Time made, as by the said Act appeareth.

ullo modo factæ irritæ sint & nullius momenti: Qd' si quis se ab aliquo divexatum exagitatum, aut molestiis affectum ullo modo jam indè sentiret, sub ejusmodi provisionum, licentiarum, fa cultatum, aut acceptationum prætextu, qui ita molestias facesserent, gravamina injicerent, aut quietem disturbarent, ipsorum singuli pœnam & animadversionem quæ in statuto de provisoribus facto subeant, ex eodem statuto planissime liquet.

Statut. de 2 H. 5. cap. 7. (a) Lollardy a Lolio. For as Cockle is the Destruction of the Corn, so is Heresy the Destruction of true Religion.

A Statute was made for Extirpation of Heresy, and Lollardy, whereby full Power and Authority was given to the Justices of Peace, and Justices of Assise to Inquire of those that hold Errors, Heresies, or Lollardy, and of their Maintainers, &c. And that the Sheriff or other Officers, &c. may arrest and apprehend them.

Statutum ad extirpandam hæresin, & hæreticam pravitatem factum erat, quo plenaria potestas & authoritas Eirenarchis, & assisarum justiciariis data, inquirendi de illis qui errores, hæreses, & hæreticam pravatem defendunt, & de eorum fautoribus &c. Et qd' vicecomes, vel alius officiarius, eos apprehendere possit.

Stat. de 2 H. 5. cap. 1.

(a) *Perperam sane, sed potius a Gualtero Lolhard Germanico quodam qui floruit circa annum Dom.* 1315. *Spelm. Glos. Tit. Lollardia.* 3 *Inst.* 43 *Linwood* 300.

Infœlix lolium, & steriles dominantur avenæ. Virgilius.
Et careant loliis oculis occultibus agri. Ovidius.

The King by Consent of Parliament, giveth Power to Ordinaries to enquire of the Foundation, Erection and Governance of Hospitals, other than such as be of the King's Foundation, and thereupon to make Correction and Reformation according to the Ecclesiastical Law.

Rex assensu parliamentario dat ordinariis potestatem inquirendi de fundatione, erectione, administratione hospitalium, præterquam eorum quæ sunt ex Regia fundatione, & etiam corrigendi & reformandi juxta legem Ecclesiasticam.

Regnat

Regnante Henrico Sexto

EXcommunicatio facta, & ſignificata per papam nullam vim habet ad aliquem incapacem in Anglia reddendum: Et hoc per antiquas leges communes, priuſquam ſtatutum de juriſdictione externa factum erat.

Rex ſolummodo poteſt concedere & licentiam dare fundandi incorporationem ſpiritualem.

Tempore Regis *Hen. 6.* Pontifex Romanus literas ſcripſit ad derogation' Reg' & majeſtatis ejus, & Eccleſiaſtici ne hiſcere quidem contra auſi ſunt; verum *Humfridus* Dux Gloceſtriæ, (ſcilt't ne perirent) in ignem projecit.

Regnante Edwardo Quarto.

EDw'do quarto regnante, Pontifex Romanus Priori Sancti Johan' Aſylum infra prioratum ſuum conceſſit, hoc diſceptatum erat, & Prior ſibi vendicavit; verum judices pronunciarunt Papam nullam habuiſſe poteſtatem concedendi aliqua aſyli jura in hoc regno, & igitur legis ſententia improbatum erat, & minime permiſſum.

In the Reign of King *Henry* VI.

EXcommunication (a) made and certified by the Pope, is of no Force to diſable any Man within England: And this is by the ancient Common Laws before any Statute was made concerning foreign Jurisdiction. 8 H. 6. f. 3? (a) Ant. 15. b. 23. b. Poſtea 27. a.

The (b) King only may grant or licence to found a Spiritual Incorporation. 9 H. 6. f. 16. b. (b) 4 Co. 107. b. Dy. 81. pl. 64.

In the Reign of K. Henry the Sixth, the Pope writ Letters in Derogation of the K. and his Regalty, and the Churchmen durſt not ſpeak againſt them; but Humfrey Duke of Glouceſter for their ſafe keeping put them into the Fire. 1 H. 7. 10.

In the Reign of King *Edward* IV.

IN the Reign of K. Edward the Fourth, the Pope granted to the Prior of St. John's, to have Sanctuary within his Priory, and this was pleaded and claimed by the Prior; but it was reſolved by the Judges, that the Pope had no Power to grant any Sanctuary within this Realm, and therefore by Judgment of the Law the ſame was diſallowed. 1 H. 7. 20.

9 E. 4. 3. Vide F. N. B. f. 44. H. agreeing herewith.

There it appeareth, that the Opinion of the King's Bench had been oftentimes, that if one spiritual Person sue another spiritual Man in the Court of Rome for a Matter Spiritual, where he might have Remedy before his Ordinary, that is the Bishop of that Diocese within the Realm, Quia trahit ipsum in placitum extra regnum, incurreth the Danger of a Præmunire: An hainous Offence, being contra legiantiæ suæ debitum, in contemptum Domini Regis, & contra Coronam & Dignitatem suas; by which it appeareth, how grievous an Offence it was against the King, his Crown and Dignity, if any Subject, although both the Persons and Cause were Spiritual, did seek for Justice out of the Realm, as though either there wanted Jurisdiction or Justice was not executed in the Ecclesiastical Courts within the same, which (as it hath been said) was an high Offence, contra Regem, Coronam & Dignitatem suas.

Nota.

9 E. 4. 28. Boon's Exam. Leg. Angliæ p. 15. 3 Inst. 114. Hale's Pl. Cor. 240.

In the K.'s Courts of Record, where Felonies are determined, the Bp. or his Deputy ought to give his Attendance, to the End that if any that is indicted and arraigned for Felony, do demand the Benefit of his Clergy, that the Ordinary may inform the Court of his sufficiency or insufficiency, that is, whether he can read as a Clerk or not, whereof notwithstand-

Eo loci perspicuum est, quod tribunal regium sæpenumero in ea fuit opinione; qd' si aliquis ecclesiasticus alium ecclasiasticum in jus vocaverit in curia romana de re aliqua Ecclesiastica, cum coram ordinario qui est Ep'us diœcesios intra regnum sibi remedium compararet, quia trahit ipsum in placitum extra regnum, pœnam præmunire incurrit: delictum sane atrox contra legiantiæ fuæ debitum, in contempt' Dom' Regis, & contra Coronam & Dignitatem suam: Unde patet quantum erat delict' contra Regem, suam Coronam, & dignitatem, si quis subditus (quamvis & persona & causa esset ecclesiastica) jus suum extra regnum persequeretur, quasi vel jurisdictio deesset, vel justitia non coleretur in curiis Ecclesiasticis intra regnum, quod ut jam diximus nefarium erat delict' contra Regem Coronam & Dignitatem suas.

In curiis Domini Regis (ad quarum cognitionem crimina feloniæ spectant) Episcopus ejusve Deputatus interesse & attendere debet, eo nimirum propositio, quod si aliquis ibidem de felonia indictatus & arrectatus existens, clericale privilegium petierit ordinarius superinde curiam illam de habilitate sive inhabilitate hujusmodi delinquenti

quentis poterit informare, cil't utrum legere valeat ut clericus sive non; & tamen ordinarius in eo casu sententiam suam ut judex ferre non potest, sed tantummodo officio ministri curiæ regalis fungitur; & judicium utrum hujusmodi persona sit habilis aut inhabilis, ad judices curiæ illius solummodo spectat: Ac quodcunq; illis ab ordinario informatum erit, ipsi judices super debit' examinatione delinquentis, sententiam suam contra ordinarii relationem promulgare possint, quia judices illi a Rege assignati sunt ejusd' causæ proprii & soli judices.

Excommunicatio papalis nullius est momenti aut authoritatis in regno Angliæ.

Tempore hujus Reg' *Ed.* quarti legatus papalis Calitium venit, animo in Angliam trajiciendi, verum Rex & qui ab ejus concilio, noluerunt permittere ut Angliam ingrederetur, priusquam jus jurandum præstitisset se nihil contra Reg' vel ejus Coronam machinatur'; qd' etiam alteri Legato Papali ipso regnante fact': Et hoc ita relatum est. 1 *H.* 7. f. 10.

ing the Ordinary is not to judge, but is a (a) Minister to the King's Court; and the Judges of that Court, are to judge of the Sufficiency or Insufficiency of the Party, whatsoever the Ordinary do inform them, and upon due Examination of the Party, may give Judgment against the Ordinary's Information, for the King's Judges are Judges of the Cause.

(a) Stanf. Cor. 133. a.

The Pope's Excommunication is of no Force within the Realm of England. 12 E. 4. f. 16.

In the Reign of King Edward the Fourth, a Legate from the Pope came to Calais, to have come into England, but the King and his Council would not suffer him to come within England, until he had taken an Oath, that he should attempt nothing against the King or his Crown: And so the like was done in his Reign to another of the Pope's Legates: And this is so reported in 1 Hen. 7, fol. 10.

Regnante Richardo Tertio.

JUdices pronunciarunt, qd' judicium vel excom-

In the Reign of King *Richard* III.

IT is resolv'd by the Judges, that a Judgment or Ex- 2 R. 3. f. 22.

communication in the Court of Rome, should not bind or prejudice any Man within Engl. at the Common Law.

In the Reign of King *Henry* VII.

1 H. 7. f. 10. IN the Reign of K. H. VII. the Pope had excommunicated all such Persons whatsoever, as had bought Allom of the Florentines; and it was resolved by all the Judges of England, that the Pope's Excommunication ought not to be obeyed, or to be put in Execution within the Realm of England.

Statut. de 1 H. 7. c. 4. In a Parliament holden in the first Year of K. H. VII. for the more sure and like Reformation of Priests, Clarks, and religious Men, culpable, or by their Demerits openly noised of incontinent living in their Bodies, contrary to their Order; it was enacted, ordained and established, by the Advice and Assent of the Lords Spiritual and Temporal, and the Commons in the said Parliament assembled, and by Authority of the same; that it be lawful to all Archbishops and Bishops, and other Ordinaries, having episcopal Jurisdiction, to punish and chastise Priests, Clarks, and religious Men, being within the Bounds of their Jurisdiction, as shall be committed afore them by Examination, and

municatio in Curia Romana non obligaret vel præjudicaret cuipiam in lege communi in regno Angliæ.

Regnante Henrico Septimo.

HEnrico septimo regnante, Pontifex Romanus sacris interdixit quotquot a lumen a Florentinis emissent; ab omnibus tamen Angliæ judicibus pronunciatum est, quod papalis interdictio non obediretur, aut executioni mandaretur in regno Angliæ.

In Parliamento an' primo Regis *Henrici* septimi habito, ad majorem & efficaciorem reformationem sacerdotum, clericorum, & personarum religiosarum, qui ob incontinentiam vel in crimen vocati, vel vulgo male audierunt contra ipsorum professionʼ, statutum ordinatum & sancitum erat concilio & assensu dominorum spiritualium & temporalium, & communitatis eodem Parliamento, & ejusdem authoritate, quod omnes Archiepiscopi & Episcopi, & alii Ordinarii, quibus est jurisdictio episcopalis, possint ex jure punire & castigare sacerdotes, clericos & personas religiosas, intra jurisdictionis ipsorum limites, quotquot coram illis examina-

inatioñe, vel alia legitima robatione requiſita per le-em eccleſiaſticam, convicti erint adulterii, fornicatio-is, inceſtus, vel alicujus in-ontinentiæ carnalis, eoſdem ncarcerando, & in carcere etinendo, quamdiu illis pro rudentia viſum fuerit juxta elicti gravitatem: Quodq; ullus prædictorum Archie-iſcoporum, Epiſcoporum, ut Ordinariorum in jus vo-entur ulla actione de incar-eratione injuſta: Sed qd' n cauſis præd', virtute hu-us ſtatuti ſint omnino inde xonerati.

Rex eſt perſona mixta, quia cum eccleſiaſticam um temporalem juriſdicti-onem habeat.

Per leges Eccleſiaſticas in hoc regno approbatas, unus ſacerdos duo benefi-cia habere non poteſt, nec Baſtardus ſacris initiarii: Verum Rex eccleſiaſtica poteſtate & juriſdictione quam habeat, in utroque diſpenſare poteſt; quia ma-la ſunt prohibita, & non mala per ſe.

lawful Proof requiſite by the Law of the Church of Adultery, Fornication, Inceſt, or any other fleſhly Incontinency, by committing them to Ward and Priſon, there to abide for ſuch Time as ſhall be thought to their Diſcretions convenient for the Quality and Quantity of their Treſpaſs: And that none of the ſaid Archbiſhops, Biſhops, or Ordinaries aforeſaid, be thereof chargeable, of, to or upon any Action of falſe or wrongful Impriſonment, but that they be utterly thereof diſcharged in any of the Caſes aforeſaid, by Virtue of this Act.

Rex (a) eſt perſona mixta, becauſe he hath both Eccleſiaſtical, and Temporal Juriſdiction. (a) 10 H. 7. 18. 1 Rol. 657. 2 Co. 44. a. 13 Co. 17. Davis 4. a.

By the Eccleſiaſtical Laws allowed within this Realm, a Prieſt cannot have two (b) Benefices, nor a (c) Baſtard can be a Prieſt. But the K. may by his Eccleſiaſtical Power and Juriſdiction, diſpence with both of theſe, becauſe they be mala prohibita, and not mala per ſe. 11 H. 7. 12. (b) Hob. 147. (c) Hob. 147.

Regnante Henrico Octavo.

STatuto Parliamenti habiti 24. Regis *Hen.* octavi facto per Regem, Epiſcopos 24. Abbates & Priores 29. (totidem enim tunc erant Domini Parliamentarii) per

In the Reign of King *Henry* VIII.

BY an Act of Parliament made the 24th Year of K. 8. that is to ſay by the xxiiii Biſhops, xxiv Abbots and Priors, for ſo many were then Lords of Parliament, Statute of 24 H. 8. c. 12. This Statute is declaratory of the ancient Laws of Engl. as manifeſtly appeareth by

that which hath been ſaid. See Br. Abr. Tit. Preſentment al Eſgliſe pl. 12. The Pope was permitted to do certain Things within this Realm by Uſurpation, and not of Right, until the Reign of H. 8.

(a) Ant. 8. b.

ment, by all the Lords Temporal and the Commons in that Parliament aſſembled, It is declared, That where by divers ſundry old authentick Hiſtories and Chronicles, it was manifeſtly declared and expreſſed, that this Realm of Engl. is an Empire, and ſo hath been accepted in the World, governed by one ſupreme Head and King having the Dignity and royal Eſtate of the (a) imperial Crown of the ſame, unto whom a Body politick compact of all Sorts and Degrees of People, divided in Terms and by Names of Spiritualty and Temporalty, been bound and ought to bear next to God, a natural and humble Obedience, he being alſo inſtitute and furniſhed by the Goodneſs and Furtherance of Almighty God, with plenary, whole, and entire Power, Preheminence, Authority, Prerogative and Juriſdiction, to render and yield Juſtice and final Determination to all manner of Folks, Reſiants or Subjects within this his Realm, in all Cauſes, Matters, Debates and Contentions, happening to occur, inſurge or begin within the Limits thereof, without Reſtraint or Provocation to any foreign Princes or Potentates of the World: The Body Spiritual whereof having Power when any Cauſe of the Law divine happened to come in Queſtion, or of ſpiritual Learning,

omnes Dominos temporales, & communitatem in eodem parliamento declaratum eſt, quod cum ex variis hiſtoriis ac chronicis antiquis & fide dignis clariſſime conſtat, hoc Angliæ regnum imperium eſſe, & ita per univerſum orbem terrarum habitum fuiſſet, qđ adminiſtratum ab uno ſupremo capite & rege, qui imperialis coronæ ejuſdem dignitatem & regiam habet majeſtatem, cui corpus politicum, ex populo cujuſcunque loci & ordinis compactum, nominibus eccleſiaſticorum & laicorum diſtinctum, obſtrictum eſt, ac naturalem ſubmiſſamque obedientiam proxime a Deo præſtare debet; cum ille etiam divini numinis benignitate & gratia, inſtructus & munitus ſit poteſtate, præheminentia, authoritate, prærogativa plenaria integra & omnimoda, ad juſtitiam reddendam, & jus decidendum omnibus ſubditis & reſidentibus intra hoc ſuum regnum, in omnibus cauſis, litibus, & contentionibus exorientibus & pullulantibus, intra ejuſdem limites ſine prohibitione aut provocatione ad quoſvis exteros orbis terrarum principes aut monarchas: Cum corpus item Eccleſiaſticum poteſtatem habeat, quando ulla cauſa legis divinæ vel Eccleſiaſticæ diſciplinæ

ciplinæ in queſtionem venit, quod declaratum, explicatum, & demonſtratum erat, per eam præd' corporis politici partem, qui eccleſiaſtici vocantur, tunc vulgo vocitata *Eccleſia Anglicana*, quæ ſemper talis habita, & etiam agnita, ut ſcientia, integritate, & ſuo numero ſemper haberetur, & hodie habeatur ex ſe ſufficiens & idonea ſine exterorum adminiculo, ad declarandum & determinandum quæcunque in queſtionem venerint, & ad adminiſtrandum omnia munia, quæ ad ſpiritualem ordinem ſpectant: Quæ ut quam commodiſſime & recte adminiſtrentur, & ipſi a corruptione & prava affectione deterreantur, Regis progenitores illuſtriſſimi, & proceres hujus Regni anteceſſores, præd' eccleſiam Angl' cum honore, tum poſſeſſionibus ſatis ſuperq; dotarunt: Leges etiam temporales ad terrarum & bonorum proprietatem decidendam & ad populum hujus Regni in unitate, pace, ſine prædatione & expilatione conſervandum adminiſtrabantur, & executioni mandabantur per diverſos judices & miniſtros alterius partis præfati corporis politici, quæ temporalitas appellatur, & utriuſque authoritates & juriſdictiones in debita juſticiæ adminiſtratione mutuo con-

That it was declared, interpreted and ſhewed by that Part of the ſaid Body politick, called the Spiritualty, then being uſually called the Engliſh Church, which always had been reputed and alſo found of that Sort, that both for Knowledge, Integrity, and ſufficiency of Number, it had been always thought, and was alſo at that Hour ſufficient and meet of it ſelf, without the intermedling of any exterior Perſon or Perſons, to declare and determine all ſuch Doubts, and to adminiſter all ſuch Offices and Duties as to the Rooms ſpiritual did appertain: For the due Adminiſtration whereof, and to keep them from Corruption, and ſiniſter Affection, the King's moſt noble Progenitors, and the Anceſtors of the Nobles of this Realm, did ſufficiently indow the ſaid Church both with Honour and Poſſeſſions: And the Laws temporal for Trial of Property of Lands and Goods, and for the Conſervation of the People of this Realm in Unity and Peace, without Rapine or Spoil, was and then was adminiſtred, adjudged, and executed by ſundry Judges and Miniſters of the other Part of the ſaid Body politick called the Temporalty, and both their Authorities and Juriſdictions did conjoin together in the due Adminiſtration of Juſtice, the one to help the other: And

where-

Whereas the King his most noble Progenitors and the Nobility and Commons of the said Realm, at divers and sundry Parliaments, as well in the Time of King Edw. 1. Edw. 3. Rich. 2. H. 4. and other noble Kings of this Realm, made sundry Ordinances, Laws, Statutes and Provisions, for the entire and sure Conservation of the Prerogatives, Liberties and Preheminences of the said imperial Crown of this Realm, and of the Jurisdict. Spiritual and Temporal of the same, to keep it from the Annoyance as well of the See of Rome, as from the Authority of other foreign Potentates, attempting the Diminution or Violation thereof, as often and from Time to Time as any such Annoyance or Attempt might be known or espied: And notwithstanding the said good Statutes and Ordinances made in the Time of the King's most noble Progenitors, in Preservation of the Authority and Prerogative of the said imperial Crown as aforesaid: Yet nevertheless sithence the Making of the said good Statutes and Ordinances, divers and sundry Inconveniencies and Dangers, not provided for plainly by the said former Acts, Statutes and Ordinances, have risen and sprung by Reason of Appeals sued out of this Realm

currerunt. Quandoquid' etiam Regis progenitores sereniſſimi, regniq; proceres, & communitas, variis & diverſis parliamentis, temporibus Regis *E.* 1. *E.* 3. *R.* 2. & *H.* 4. & aliorum ſereniſſimorum hujus Regni regum, varias ordinationes, leges, ſtatuta & proviſiones fanxerint, ad ſolidam & ſalutarem prærogativarum, libertatum, præheminentiarum præfatæ coronæ imperialis hujus Regni, & jurisdictionum ſpiritualium & temporalium ejuſdem conſervationem, ut defenderetur tam a detrimentis quæ a ſede Romana imminebant, quam ab authoritate aliorum principum exterorum, qui eandem imminuere aut violare machinarentur, quoties ſingulis temporibus ejuſmodi detrimenta aut machinationes proſpicerentur aut detegerentur: quamvis autem ſtatuta illa ſalutaria & ordinationes temporibus ſereniſſimorum progenitorum Regis, ad authoritatem & prærogativam præfatæ coronæ imperialis firmandam facta fuerint, ut jam antea dictum: Nihilominus ex quo illa facta fuerint, quamplurima incommoda & pericula non pridem proviſa in ſuperioribus illis ſtatutis & ordinationibus pullularint per appellationes ad ſedem remanam in cauſis teſtamen-

rlis, matrimonialibus, di-
ortiis, jure decimarum, ob-
tionibus & obventioni-
is, non ſolum ad pertur-
ationem, vexationem, &
penſas Regiæ celſitudi-
s & quam plurimorum e-
s ſubditorum & reſiden-
um in hoc Regno; ve-
metiam ad magnam pro-
actionem & impeditio-
em in cauſis illis vere &
brevi tempore deciden-
is: Quoniam qui ad Ro-
anam curiam appellarunt,
plerumque fecerunt, ad
lſitiam protelandam, cum-
ue tantum erat interval-
m inter hoc regnum &
omam, ut neceſſariæ pro-
ationes ex certa cauſæ ſci-
ntia tam perfecte haberi,
ut teſtes tam recte exami-
ari non poſſent, quam intra
oc regnum; uſque adeo,
t qui illis appellationibus
ivexati fuerint nullum ple-
umq; remedium ſuis malis
venerint. Unde Rex,
egni proceres, & commu-
itas perpendentes magnas
normitates, pericula, pro-
raſtinationes & detrimen-
a, quæ tam ſuæ celſitudi-
i, quam ſuis proceribus,
ubditis, & intra regnum
ium reſidentibus in præd'
auſis teſtamentariis, ma-
rimonialibus, divortiis, de-
imis, oblationibus & ob-
ventionibus, indies exori-
entur, Regio ſuo aſſenſu
& dominorum ſpirituа-
ium ac temporalium, nec
non communitatis con-

to the See of Rome, in Cauſes teſtamentary, Cauſes of Matrimony and Divorces, Right of Tithes, Oblations and Obventions, not only to the great Inquietation, Vexation, Trouble, Coſts and Charges, of the King's Highneſs and many of his Subjects and Reſiants in this his Realm, but alſo to the great Delay and Let to the true and ſpeedy determination of the ſaid Cauſes: Foraſmuch as the Parties appealing to the ſaid Court of Rome, moſt commonly did the ſame for delay of Juſtice: And foraſmuch as the great Diſtance of Way was ſo far out of this Realm, ſo that the neceſſary Proofs nor the true knowled. of the Cauſe could neither be ſo well known, or the Witneſſes there ſo well examin'd, as within this Realm: So that the Parties grieved by Means of the ſaid Appeals, were moſt Times without Remedy. In Conſideration thereof, the K. his Nobles and Commons, conſidering the great Enormities, Damages, long Delays and Hurts that as well to his Highn. as to his noble Subjects, Commons, and Reſiants of this his Realm, in the ſaid Cauſes Teſtamentary, Cauſes of Matrimony and Divorces, Tithes, Oblations and Obventions, did daily enſue; did therefore by his Royal Aſſent, and by the Aſſent of the Lords Spiritual and Temporal, and the Commons

in

in that Parliament aſſembled, and by Authority of the ſame, enact, eſtabliſh, and ordain, that all Cauſes Teſtamentary, Cauſes of Matrimony and Divorces, Rights of Tithes, Oblations, and Obventions, the Knowledge whereof by the Goodneſs of Princes of this Realm, and by the Laws and Cuſtoms of the ſame, appertained to the Spiritual Juriſdion of this Realm, then already commenced, moved, depending, being, happening, or hereafter coming in Contention, Debate, or Queſtion within this Realm, or within any of the King's Dominions, or Marches of the ſame, or elſewhere, whether they concern the King his Heirs or Succeſſors, or any other Subjects or Reſiants within this Realm, of what Degree ſoever they be, ſhould be from thenceforth heard, examined, diſcuſſed, clearly, finally, and definitively adjudged and determined within the King's Juriſdiction and Authority and not elſewhere, in ſuch Courts Spiritual and Temporal of the ſame, as the Natures, Conditions, and Qualities of the Caſes and Matters aforeſaid in Contention, or thereafter happening in Contention ſhould require, without having any reſpect to any Cuſtom, Uſe, or Sufferance, in Hinder. Let, or Prejud. of the ſame, or to any other thing uſed or ſuffered to the contrary there-

This alſo is declaratory of the ancient Law, as it appeareth both by 9E. 4. 3, F. N. B. 44. and many other Caſes and Stat. aboveſaid.

ſenſu in pleno parliamen
ſciverunt, ſanxerunt, & ſta
tuerunt, quod omnes cau
teſtamentariæ, matrimo
ales, divortia, jus decim
rum, oblationum & obve
tionum, quorum cognitio
beneficentia principum h
jus regni, & ex ejuſdem
gibus & conſuetudinibus
ſpiritualem hujus regni j
riſdictionem ſpectarunt
tunc exortæ & dependent
exorituræ in poſterum, co
troverſæ aut controverte
dæ in hoc regno, vel in u
Regis Dominiis, aut eor
dem limitibus vel alibi,
ve ad regem ipſum, e
hæredes vel ſucceſſores v
quemvis alium ſubdi
rum, aut intra hoc Re
num reſidentium, cu
cunque loci vel ordinis ſp
ctent; jam inde audiant
examinentur, diſceptent
clare finaliter & definiti
adjudicentur & deter
nentur, intra Regis ju
dictionem & authoritate
nec alibi, in ejuſmodi cu
is eccleſiaſticis & tempo
libus ejuſdem, juxta cu
rum quæ ſunt controver
& controvertendæ na
ram, conditiones & qua
tates, nulla habita ratio
cujuſcunque conſuetudi
aut tollerationis, vel
in contrarium uſitatæ
toleratæ in earundem o
ſtaculum, impedimentu
aut præjudicium, qu
cunque alio modo quib
cunque perſonis quo
pa

to; quibuſcunque exte- inhibitionibus, appella- nibus, reſtrictionibus, ju- iis, vell ullis aliis proceſ- us vel impedimentis cu- cunque naturæ, nominis, alitatis, fuerint, a ſede omana, aut quibuſcun- e curiis exteris aut orbis rarum principibus, aut hoc regno aut Regis ominiis, aut eorundem nitibus ad ſedem Roma- m, vel ad alias quaſcun- e curias exteras, aut incipes, ad ejuſdem ob- aculum aut impedimen- m ullo modo non obſtan- bus, ut ex eodem ſtatuto re elucet.

Ex ſtatuto parliamenta- o anno 25 *Henrici* octavi, r Regem, dominos ſpiri- ales, temporales, ac com- unitatem in parliamento nvenientes declaratum t, quod neque Rex, ſui eredes, ſucceſſores hujus gni Reges, neque ulli bditi hujus regni, aut iorum ejus dominiorum uorumcunque jam inde eterent a pontifice Ro- nano, vel ſede Romana, el authoritate ejuſdem, el alicujus prælati hujus gni, vel ab aliqua per- ona ſive perſonis, qui inde uthoritatem habent, aut rætendunt, venias, diſpenſa- iones, compoſitiones, facul- ates, conceſſiones, reſcrip- a, delegationes, aut alia in- rumenta aut ſcripta cujuſ- of, by any other Manner, Perſon or Perſons, in any Manner of wiſe: Any foreign Inhibitions, Appeals, Sentences, Summons, Citations, Suſpenſions, Interdictions, Excommunications, Reſtraints, Judgments, or any other Proceſs or Impediment, of what Natures, Names, Qualities, or Conditions ſoever they be, from the See of Rome, or any other foreign Courts or Potentates of the World, or from and out of this Realm, or any other the King's Dominions or Marches of the ſame, to the See of Rome, or to any other foreign Courts or Potentates, to the Let or Impediment thereof in any wiſe notwithſtanding, as by the ſaid Act appeareth.

By an Act of Parliament in 25 H. 8. It is declared by the King, the Lords Spiritual and Temporal, and the Commons in that Parl. aſſembled; that neither the K. his Heirs, nor Succeſſors King's of this Realm, nor any his Subjects of this Realm, nor of any other his Dominions, ſhould from thenceforth ſue to the ſaid Biſhop of Rome called the Pope, or to the See of Rome, or to any Perſon or Perſons having or pretending any Authority by the ſame, for Licences, Diſpenſations, Impoſitions, Faculties, Grants, Reſcripts, Delegacies, or any other Inſtruments, or Writings, of what Kind, Name, Nature, or Quality ſoever they

Stat: 25 H. 8. c. 21. This was alſo declaratory of the antient Law, as by that which hath been ſaid appeareth.

they be of, for any Cause or Matter, for the which any Licence, Dispensation, Composition, Faculty, Grant, Rescript, Delegacy, Instrument, or other Writing, theretofore had been used and accustomed to be had and obtained at the See of Rome, or by Authority thereof, or of any Prelate of this Realm: Nor for any Manner of other Licences, Dispensations, Compositions, Faculties, Grants, Rescripts, Delegacies, or any other Instruments or Writings, that in Causes of Necessity might lawfully be granted, without offending of the Holy Scripture and Laws of God, but that from thenceforth every such Licence, Dispensation, Composition, Faculty, Grant, Rescript, Delegacy, Instrument, and other Writing afore named and mentioned, necessary for the King, his Heirs and Successors, and his and their People and subjects, upon due Examination of the Causes and Qualities of the Persons procuring such Dispensations, Licences, Compositions, Faculties, Grants, Rescripts, Delegacies, Instruments, or other Writings, should be granted, had, and obtained from Time to Time within this his Realm, and other his Dominions, and not elsewhere, in Manner and Form following, and not otherwise, that is to say: The Archbishop of Canterbury, for the Time being, and

cunque generis, nomi
naturæ, aut qualitatis,
de causa vel re, pro q
ulla venia, dispensatio, co
positio, facultas, concess
rescriptum, delegatio,
strumentum, aut aliud scri
tum, quæ hactenus usit
fuerant, & a sede Roma
impetrari consueverant
Neque pro quibuscunq
aliis veniis, dispensationib
compositionibus, facultat
bus, concessionibus, R
scriptis, delegationibus
aliis quibuscunque instr
mentis aut scriptis, quæ
cessitatis causa ex jure, s
sacrarum literarum aut
gum divinarum præjudic
concedi poterant; sed q
jam inde quælibet ejusm
di venia, dispensatio, co
positio, facultas, concess
rescriptum, delegatio,
strumentum, aut alia scri
ta prænominata & mem
rata, Regi, suis hæredib
& successoribus, subditisq
suis, examinatione deb
causarum & qualitatum
rum, qui ejusmodi dispe
sationes, venias, compos
ones, facultates, concess
nes, rescripta, delegation
instrumenta, vel alia scri
ta procurant, concederen
haberentur, & impetra
tur deinceps intra hoc su
regnum, & alia sua do
nia, & non alibi, juxta
mam quæ hic subjicitur
non aliter, viz. Archiep
copus Cantuariensis q
pro tempore fuerit, & e

ſucceſſores deinceps poteſtatem & authoritatem habeant, prout ipſis viſum fuerit, dandi, concedendi, & diſponendi, per inſtrumentum ſub ejuſdem archiepiſcopali ſigillo Regi, & ejus hæredibus & ſucceſſoribus hujus regni Regibus, tam omnimodas ejuſm' licentias, venias, diſpenſationes, compoſitiones, facultates, conceſſiones, reſcripta, delegationes, inſtrumenta, & quævis alia ſcript' de cauſis ſacris ſcripturis, & divinis legibus non contradicentibus, quæ hactenus impetrari ſolita ſunt per Regem & ſereniſſimos progenitores, vel quemvis illorum ſubditum a ſede Romana, vel a quacunque perſona, authoritate ejuſdem, necnon quaſlibet alias venias, diſpenſationes, facultates, compoſitiones, conceſſiones, reſcripta, delegationes, inſtrumenta, & quævis alia ſcripta, quæ in ejuſmodi cauſis & rebus ſingulis, ad Regis, ſuorum hæredum & ſucceſſorum, honorem & ſecuritatem, hujuſque regni opulentiam & emolumentum ſint conſentanea & neceſſaria; ita tamen, quod præfatus archiepiſcopus aut ejus ſucceſſores, nullo modo ulla de cauſa aut re divini numinis legibus repugnante, aliquam diſpenſationem, veniam, reſcriptum, aut quodvis aliud ſcriptum prius me-

his Succeſſors, ſhould have Power and Authority from Time to Time by their Diſcretions, to give, grant, and diſpoſe by an Inſtrument under the Seal of the ſaid Archbiſhop unto the K. and unto his Heirs and Succeſſors K.'s of this Realm, as well all Manner ſuch Licenſes, Diſpenſations, Compoſitions, Faculties, Grants, Reſcripts, Delegacies, Inſtruments, and all other Writings, for Cauſes not being contrary or repugnant to the Holy Scriptures and Laws of God, as theretofore had been uſed, and accuſtomed to be had and obtained by the King, or any his moſt noble Progenitors, or any of his, or their Subjects, at the See of Rome, or any Perſon or Perſons by Authority of the ſame, and all other Licences, Diſpenſations, Faculties, Compoſitions, Grants, Reſcripts, Delegacies, Inſtruments, and other Writings, in, for, and upon all ſuch Cauſes and Matters as ſhould be convenient and neceſſary to be had for the Honour and Surety of the K. his Heirs and Succeſſors, and the Wealth and Profit of this his Realm, ſo that the ſaid Archb. or any his Succeſſors, in no manner wiſe ſhould grant any Diſpenſation, Licence, Reſcript, or any other Writing before rehearſed, for any Cauſe or Matter repugnant to the Law of Almighty God, as by the ſaid Act alſo ap-

appeareth. If it be demanded what Canons, Conſtitutions, Ordinances, and Synodals provincial, are ſtill in force within this Realm, I anſwer that it is reſolved and enacted by Authority of Parliament, that ſuch as have been allowed by (a) general Conſent and Cuſtom within the Realm, and are not contrariant or repugnant to the Laws, Statutes, and Cuſtoms of the Realm, nor to the Damage or Hurt of the King's Prerogative Royal, are ſtill in force within this Realm, as the King's Eccleſiaſtical Laws of the ſame. Now, as Conſent and Cuſtom hath allow'd thoſe Canons, ſo no Doubt by general Conſent of the whole Realm, any of the ſame may be corrected, inlarged, explained, or abrogated. For Example, there is a Decree that all Clarks that have received any manner of Orders, greater or ſmaller, ſhould be exempt, pro cauſis criminalibus before the temporal Judges. This Decree had never any force within England: Firſt, for that it was never approved and allowed of by general Conſent within the Realm: Secondly, it was againſt the Laws of the Realm, as it doth appear by infinite Precedents: Thirdly, it was againſt the Prerogative and Sovereignty of the King, that any Subject within this Realm

(a) Co. Lit. 344. a.

This appeareth by the Reſolution of all the Judges in 7 H. 8. Lib. Kelw. fol. 18. And this was long before any Act of Parliament was made againſt foreign Juriſdiction by King H. 8.

moratum concedet, ut ex eodem ſtatuto clariſſim' patet. Si quis quærat, qui canones, conſtitutiones, ordinationes, & ſynodi provinciales vires intra hoc regnum habeant, reſpondeo, parliamentaria authoritate judicatum & ſancitum eſſe, qd' quæ generali conſenſu & conſuetud' intra hoc regnum approbantur, & regni legibus, ſtatutis, & conſuetudin' non adverſantur, neq; regiæ prærogativæ fraudi ſunt, vim ſuam & virtutem intra hoc regnum habent, ut ejuſd' Regiæ leges eccleſiaſticæ. Cum autem, ut conſenſus & conſuetudo hos canones comprobaverint, ita procul dubio generali totius regni conſenſu quivis eorum canonum corrigi, adaugeri, explicari, aut abrogari poſſit. Verbi gratia, decretum extat, quod ſinguli clerici qui ſacris ullo modo ſunt initiati pro cauſis criminalibus coram judice temporali exempti eſſent. Hoc decretum, nullas in Anglia vires habuit. Primum, quia nunquam generali conſenſu in hoc regno acceptum & approbatum erat. Secundo, quod regni legibus adverſabatur, ut ex innumeris exemplis luce clarius eſt. Tertio, quod contra Regiam prærogativam & majeſtatem erat, quod aliquis ſubditus infra

hoc

oc regnum legibus hujus gni non ſubjaceret.

Regnante Elizabetha.

Tatuto Parliamento præfato (ex quo cauſa principalis tunc controverſa rtim dependet) ſancito no primo regni *Elizabethæ* declaratum eſt; iod cum regnante *Henrico* octavo variæ leges ſalures, & ſtatuta lata & ſanta erant, tam ad extirndam & penitus tollenm omnimodam uſurtam & exteram poteſtatem & authoritatem ex hoc gno, & aliis ejus Domiis & territoriis, quam reſtituendam & adunindam antiquam juriſdictinem, authoritatem, ſupeoritatem, & præheminenam hujus regni coronæ nperiali, quæ de jure ad ndem ſpectant & pertient; unde ab anno 25. uſdem Regis *Henrici* octavi ſubditi hujus regni deotiſſimi, ordine & recte in fficio continebantur, & uamplurimis magnis & tolerandis expenſis & oleſtiis liberati fuerint uibus antea injuſte oppreſ & conflictati fuerint, per oteſtatem & authoritatem xteram eo uſq; uſurpatam; tque omnimoda uſurpata extera poteſtas, authoriaſque ſpiritualis & tempoalis, in perpetuum exter-

ſhould not be ſubject to the Laws of this Realm.

In the Reign of Q. *Elizabeth.*

BY the ſaid Act of Parliament (whereupon the principal Caſe then in Queſtion partly dependeth) made in the firſt Year of the Reign of the late Queen Elizabeth, it is declared; That where in the Time of the Reign of K. Henry the Eighth, divers good Laws and Statutes were made and eſtabliſhed, as well for the utter Extinguiſhment and putting away, of all uſurped foreign Powers and Authorities, of this Realm, and other her Dominions and Countries, as alſo for the Reſtoring and Uniting to the imperial Crown of this Realm, the ancient Juriſdiction, Authorities, Superiorities, and Preheminences, to the ſame of Right belonging and appertaining; by Reaſon whereof her moſt humble Subjects, from the xxv Year of the ſaid King Henry the Eighth, were continually kept in good Order, and were disburdened of divers great and intollerable Charges and Vexations, before that Time unlawfully taken, and exacted by ſuch foreign Power and Authority, as before that was uſurped; and to the Intent, that all uſurped and foreign Power and Authority, Spiritual and Temporal, might

The Statute of 1. of Queen Elizabeth.

for ever be clearly extinguished, and never be used or obeyed within this Realm, or any other her Dominions or Countries; it was by the Authority of that Parliament enacted, That no foreign Prince, Person, Prelate, State or Potentate, Spiritual or Temporal, should at any Time after the last Day of that Session of Parliament use, enjoy or exercise any manner of Power, Jurisdiction, Superiority, Authority, Preheminence, or Privilege Spiritual or Ecclesiastical within this Realm, or within any other the Q's Dominions or Countries, that then were, or hereafter should be, but from thenceforth the same should be clearly abolished out of this Realm, and all other her Dominions for ever, any Statute, Ordinance, Customs, Constitutions, or any other Matter or Cause whatsoever to the Contrary in any wise notwithstanding. And it was then also established and enacted by the Authority of that Parliament, that such Jurisdictions, Privileges, Superiorities, and Preheminences, Spiritual or Ecclesiastical, as by any Spiritual or Ecclesiastical Power or Authority, had heretofore been, or might lawfully be exercised or used for the Visitation of the Ecclesiastical State and Persons, and for Reformation, Order, and Correction of the same, & of all

minaretur, & nunquam in hoc regno vel aliis ejus Dominiis aut territoriis sit in usu, aut observetur; authoritate ejusdem Parliamenti scitum & sancitum erat: Quod nullus exterus princeps, prælatus, status vel Dynasta spiritualis aut temporalis, a postremo die sessionis hujus Parliamenti, ulla potestate & jurisdictione, superioritate, authoritate, prærogativa, aut privilegio spirituali aut Ecclesiastico intra hoc regnum, aut alia Reginæ Dominia aut territoria, unquam uteretur, frueretur, aut eadem exerceret; sed qd' deinceps eadem in perpetuum ex hoc regno, & aliis ejus Dominiis in æternum exterminarentur, quocunque statuto, ordinatione, consuetudine, constitutione, aut re quavis alia non obstante. Eadem etiam authoritate Parliamentaria scitum & sancitum erat, qd' ejusmodi jurisdictiones, privilegia, superioritates, prærogativæ Spirituales vel Ecclesiasticæ, quæ per aliquam Spiritualem vel Ecclesiasticam authoritatem hactenus in usu essent, vel de jure esse possent ad visitationem Ecclesiastici status Spiritualium atque ad ejusdem etiam status & ejusmodi personarum, atque etiam omnium error, Hæresium, Schisma-

tum

m, abusuum, offensarum, ntemptuum, & enormi-tum reformationem, co-tionem & correctionem, perialis hujus regni coro-e adunirentur & adnecte-ntur. Quodque Regina, eredes & successores hu-s Regni Reges & Regi-e, virtute hujus statuti enariam potestatem & thoritatem haberent per eras patentes sub magno ngliæ sigillo, assignandi, ominandi, & authoritate struendi, quando & quo-es & quamdiu Reginæ, eredibus suis vel hujus gni successoribus, visum it ejusmodi personam aut rsonas nativas ad exer-ndum & exequendum b præd' Regina, hæredi-us suis vel successoribus, nnimodas jurisdictiones, rivilegia & præheminenti-quovis modo ad aliquam piritualem vel Ecclesiasti-m jurisdictionem perti-entes intra hæc Angliæ & liberniæ Regna, aut quæ-s alia ipsius Dominia vel erritoria: Atq; etiam ad sitand', reformandum, or-nandum, corrigendum, & e-endandum omnes erro-es, hæreses, schismata, abu-s, offensas, contemptus, & normitates quascunq; quæ pirituali vel Ecclesiastica iqua potestate, authori-te vel jurisdictione, refor-ari, ordinari, corrigi, coer-ri, vel emandari legitime

Manner of Errors, Heresies, Schisms, Abuses, Offences, Contempts, and Enormities, should for ever by Authority of that Parliament, be united and annexed to the imperial Crown of this Realm. And that the Q. her Heirs and Successors, Kings and Queens of this Realm, should have full Power and Authority by Virtue of that Act, by Letters Patent under the Great Seal of Engl. to assign, name, and authorise, when and as often as the Queen, her Heirs or Successors should think meet and convenient, and for such and so long Time as should please the Queen her Heirs or Successors, such Person or Persons being natural born Subjects to the Queen her Heirs or Successors, as the said Queen her Heirs or Successors should think meet, to exercise, use, occupy, and execute, under the said Queen her Heirs and Successors, all manner of Jurisdictions, Privileges, and Preheminences, in any wise touching or concerning any Spiritual or Ecclesiastical Jurisdiction within these Realms of Engl. and Ireland, or any other her Dominions or Countries, and to visit, reform, redress, order, correct, and amend, all such Errors, Heresies, Schisms, Abuses, Offences, Contempts and Enormities whatsoever, which by any manner Spiritual or

Eccleſiaſtical Power, Authority, or Jurisdiction, could or might lawfully be reformed, ordered, redreſſed, corrected, reſtrained or amended, to the Pleaſure of Almighty God, the Encreaſe of Virtue, and the Conſervation of the Peace, and the Unity of this Realm: And that ſuch Perſon or Perſons ſo to be named, aſſigned, authoriſed, and appointed by the ſaid M. her Heirs or Succeſſors, after the ſaid Letters Patent, to him or them made and delivered as is aforeſaid, ſhould have full Power and Authority by Virtue of that Act, and of the ſaid Letters Patent under the ſaid M. her Heirs or Succeſſors, to exerciſe, uſe, and execute all the Premiſſes according to the Tenor and Effect of the ſaid Letters Patent, any Matter or Cauſe to the Contrary in any wiſe notwithſtanding, as by the ſaid Act alſo appeareth.

12 Eliz. Reg. Dyer.

It was adjudged in the Court of Com. Pleas, by Sir James Dyer, Weſton, and the whole Court, that a Dean or any other Eccleſiaſtical Perſon may reſign, to the K. (as (a) divers did to K. Ed. VI.) for that he had the Authority of the ſupream Ordinary.

(a) 2 Bulſtr. 4.

From the 1 until the xi Year of the late Q. Eliz. Reign no Perſon of what Perſuaſion of Chriſt. Religion ſoever, at any Time refuſed to come to the publick divine ſervice, celebra-

poſſint ad divini numinis gloriam, virtutis incremen-tum, & pacis unitatiſq; in hoc regno conſervationem. Porro qd' ejuſmodi perſon vel perſonæ nominandæ, aſſignandæ, authoritate inſtruendæ & inſtituendæ pr præfatam reginam, hæredes vel ſucceſſores, poſtquam præd' literæ patentes ip fuerint confectæ, & ipſi w ipſis in manus traditæ, jam dictum eſt, virtute juſdem ſtatuti & literarum patentium, plenariam p teſtatem & authoritat haberent exercendi & ex quendi omnia præmiſſa ſ prædict' Regina, hæredib vel ſucceſſoribus, juxta p dictarum literarum paten um tenorem & ſententia quavis re aut cauſa in co trarium non obſtante, ut eodem ſtatuto eſt etiam p ſpicuum.

De communium placi rum tribunali per Domin *Jacob. Dyer*, *Weſton*, & niverſam curiam pronou ciatum erat: Qd' decan vel quævis alia perſona E cleſiaſtica Regi poſſit reſ nare, (ut nonnulli Regi E wardo ſexto reſignarunt) quod ſupremi Ordinarii teſtatem habuerit.

Ab anno Regni Reginæ lizab' primo uſq; ad undec mum nemo quacunq; rit de Chriſtiana Religion perſuaſione, ad rem D

am in Anglicana Eccleſia ublice celebratam, & in acroſancto & certiſſimo Dei verbo fundatam, & ublica authoritate intra oc Regnum confirmatam ccedere recuſavit. Poſtuam autem *Pii Quinti* Bulla contra prædict' Regiam, anno Regni undecino publicata fuerat, contiens (inter alia quæ nimis ongum eſt pro noſtro inſtituto jam percurrere) hæc pſiſſima verba: *Pius Epiſopus, ſervus ſervorum Dei, &c. Miſſæ ſacrificium, preces, jejunia, ciborum deletum, cœlibatum, illa Regina* Elizabetha *abolevit, eadem occupato Regno ſupremi Eccleſiæ Capitis locum in omni Anglia, ejuſque præcipuam authoritatem atque juriſdictionem ſibi uſurpans, Regnum ipſum rurſus in miſerum exitium revocavit:* " *Ad quam velut ad aſylum omnium infeſtiſſimi perfugium invenerunt, &c. Declaramus præd'* Elizabetham *eiq; adhærentes, in præd' Anathematis ſententiam incurriſſe: Quin etiam ipſam prætenſo Regni præd' jure, necnon omni & quocunque Dominio, dignitate, privilegioque privatam: Præcipimus & interdicimus univerſis & ſingulis proceribus, ſubditis, & populis, & aliis præd', ne illi ejuſve monitis, mandatis, & legibus audeant obedire; qui ſecus egerint eos ſimili Anathematis ſententiæ*

ted in the Church of England, being evidently grounded upon the ſacred and infallible Word of Almighty God, and eſtabliſhed by publick Authority within this Realm: But after the Bull of Pius Quintus was publiſhed againſt her Majeſty in the 13 Year of her Reign (containing amongſt other Things too long to be repeated for this purpoſe) in theſe Words: *Pius* Biſhop, Servant of God's Servants, *&c.* She (Queen *Elizabeth*) hath clean put away the Sacrifice of the Maſs, Prayers, Faſtings, Choice or Difference of Meats, and ſingle Life: She poſſeſſing the Kingdom, and by uſurping the Place of the ſupream Head of the Church in all *England*, and the chief Authority and Juriſdiction of the ſame, hath again brought the ſaid Realm into miſerable Deſtruction. Unto her all ſuch as are the Worſt of the People reſort, and are by her received into ſafe Protection, *&c.* We make it known, that the ſaid *Elizab.* and as many as ſtand on her ſide in the Matter above named, have run into the Danger of our Curſe: We make it alſo known, that we have deprived her from that Right ſhe pretended to have in the Kingdom aforeſaid, and alſo from all and every her Authority, Dignity and Privilege. We charge and forbid all and every the Nobles and Subjects, and People, and others aforeſaid, that they be not

Pſalm 109. 28. Though they Curſe, yet bleſs thou (O Lord) and let them be confounded that riſe up againſt me, but let thy Servant Rejoice.

Which was the Prayer her Majeſty made when this Bull was publiſhed againſt her.

Ecclesiastical Power, Authority, or Jurisdiction, could or might lawfully be reformed, ordered, redressed, corrected, restrained or amended, to the Pleasure of Almighty God, the Encrease of Virtue, and the Conservation of the Peace, and the Unity of this Realm: And that such Person or Persons so to be named, assigned, authorised, and appointed by the said M. her Heirs or Successors, after the said Letters Patent, to him or them made and delivered as is aforesaid, should have full Power and Authority by Virtue of that Act, and of the said Letters Patent under the said M. her Heirs or Successors, to exercise, use, and execute all the Premisses according to the Tenor and Effect of the said Letters Patent, any Matter or Cause to the Contrary in any wise notwithstanding, as by the said Act also appeareth.

12 Eliz. Reg. Dyer.

It was adjudged in the Court of Com. Pleas, by Sir James Dyer, Weston, and the whole Court, that a Dean or any other Ecclesiastical Person may resign, to the K. (as (a) divers did to K. Ed. VI.) for that he had the Authority of the supream Ordinary.

(a) 2 Bulstr. 4.

From the 1 until the 11 Year of the late M. Eliz. Reign no Person of what Persuasion of Christ. Religion soever, at any Time refused to come to the publick divine service, celebra-

possint ad divini numinis gloriam, virtutis incrementum, & pacis unitatisq; in hoc regno conservationem. Porro qd' ejusmodi persona vel personæ nominandæ, assignandæ, authoritate instruendæ & instituendæ per præfatam reginam, hæredes vel successores, postquam præd' literæ patentes ipsi fuerint confectæ, & ipsi vel ipsis in manus traditæ, ut jam dictum est, virtute ejusdem statuti & literarum patentium, plenariam potestatem & authoritatem haberent exercendi & exequendi omnia præmissa sub prædict' Regina, hæredibus vel successoribus, juxta prædictarum literarum patentium tenorem & sententiam, quavis re aut causa in contrarium non obstante, uti eodem statuto est etiam perspicuum.

De communium placitorum tribunali per Dominum *Jacob. Dyer*, *Weston*, & universam curiam pronunciatum erat: Qd' decanus vel quævis alia persona Ecclesiastica Regi possit resignare, (ut nonnulli Regi Edwardo sexto resignarunt) et quod supremi Ordinarii potestatem habuerit.

Ab anno Regni Reginæ Elizab' primo usq; ad undecimum nemo quacunq; fuerit de Christiana Religione persuasione, ad rem Divi-

nam

nam in Anglicana Ecclesia publice celebratam, & in sacrosancto & certissimo Dei verbo fundatam, & publica authoritate intra hoc Regnum confirmatam accedere recusavit. Postquam autem *Pii Quinti* Bulla contra prædict' Reginam, anno Regni undecimo publicata fuerat, continens (inter alia quæ nimis longum est pro nostro instituto jam percurrere) hæc ipsissima verba: *Pius Episcopus, servus servorum Dei, &c. Missæ sacrificium, preces, jejunia, ciborum delectum, cœlibatum, illa Reginæ* Elizabetha *abolevit, eadem occupato Regno supremi Ecclesiæ Capitis locum in omni Anglia, ejusque præcipuam authoritatem atque jurisdictionem sibi usurpans, Regnum ipsum rursus in miserum exitium revocavit:* "*Ad quam* "*velut ad asylum omnium* "*infestissimi perfugium in-*"*venerunt, &c. Declara-*"*mus præd'* Elizabetham "*eiq; adhærentes, in præd'* "*Anathematis sententiam* "*incurrisse: Quin etiam* "*ipsam prætenso Regni* "*præd' jure, necnon omni* "*& quocunque Dominio,* "*dignitate, privilegioque* "*privatam: Præcipimus* "*& interdicimus universis* "*& singulis proceribus,* "*subditis, & populis, & a-*"*liis præd', ne illi ejusve* "*monitis, mandatis, & le-*"*gibus audeant obedire;* "*qui secus egerint eos simi-*"*li Anathematis sententiæ*

ted in the Church of England, being evidently grounded upon the sacred and infallible Word of Almighty God, and established by publick Authority within this Realm: But after the Bull of Pius Quintus was published against her Majesty in the 11 Year of her Reign (containing amongst other Things too long to be repeated for this purpose) in these Words: *Pius* Bishop, Servant of God's Servants, *&c.* She (Queen *Elizabeth*) hath clean put away the Sacrifice of the Mass, Prayers, Fastings, Choice or Difference of Meats, and single Life: She possessing the Kingdom, and by usurping the Place of the supream Head of the Church in all *England*, and the chief Authority and Jurisdiction of the same, hath again brought the said Realm into miserable Destruction. Unto her all such as are the Worst of the People resort, and are by her received into safe Protection, *&c.* We make it known, that the said *Elizab.* and as many as stand on her side in the Matter above named, have run into the Danger of our Curse: We make it also known, that we have deprived her from that Right she pretended to have in the Kingdom aforesaid, and also from all and every her Authority, Dignity and Privilege. We charge and forbid all and every the Nobles and Subjects, and People, and others aforesaid, that they be

Psalm 109. 28. Though they Curse, yet bless thou (O Lord) and let them be confounded that rise up against me, but let thy Servant Rejoice.

Which was the Prayer her Majesty made when this Bull was published against her.

not so hardy as to obey her or her Admonitions, Commandments, or Laws, upon Pain of the like Accurse upon them. We Pronounce that all whosoever by any Occasion have taken their Oath unto her, are for ever discharged of such their Oath, and also from all Fealty and Service, which was done to her by Reason of her Government, &c. As by the said Bull more at large appeareth. After this Bull, all they that depended on the Pope obeyed the Bull, disobeyed their gracious and natural Soveraign, and upon this Occasion refused to come to the Church. The publishing of this Bull by a Subject against his Soveraign (as appeareth by that which hath been oftentimes said) was Treason in the highest Degree, by the ancient Com. Laws of Engl. For if it were Treason to publish a Bull of Excommunication within this Realm against a Subject thereof, as it was adjudged in the Reign of K. Ed. I. a fortiori it is Treason in the highest Degree to publish such a Bull against the Soveraign and Monarch her self. After this Bull many Bulls of Absolution and Reconciliation to the Church of Rome were published and dispersed amongst her Majesty's Subjects, to withdraw them from their natural Loyalty and Allegiance to their Soveraign, whereupon no small Inconveniences (as

3 Inst. 101.

"*innodamus: Omnes qui illi*
"*quomodocunq; juraverunt*
"*a juramento hujusmodi, ac*
"*omni prorsus Dom' fide-*
"*litatis & obsequii debito*
"*perpetuo absolutos decla-*
"*ramus, ut ex ipsa Bulla*
"*plenius videre est.* Hac Bulla publicata, omnes qui Pontifici Romano adhæserunt, Bullæ obtemperarunt, obedientiam erga principem benignissimam, & nativam Dominam, hac arrepta occasione abjecerunt, ad Ecclesiam Anglicanam accedere recusarunt. Publicatio hujus Bullæ per subditum contra suum principem, ut manifestum & testatum est ex illis, quæ subinde jam dicta fuerunt, crimen erat Majestatis læsæ & imminutæ juxta antiquas communes Angliæ leges: Etenim si læsæ Majestatis crimen erat, excommunicationis Bullam in hoc Regno contra subditum publicare, ut regnante *Edwardo Primo* adjudiactum fuerit; a fortiori Bullam contra Regem & ipsum Monarcham publicare, Majestatis læsæ in summo gradu crimen est. Post hanc Bullam publicatam, plurimæ absolutionis, & ad Romanam Ecclesiam reconciliationis, Bullæ publicatæ & dispersæ erant inter Majestatis suæ subditos, ad eos a fidelitatis & obsequii debito abstrahendos, unde cum magna mala & incommoda (ut

con-

onstat) promanarint: In Parliamento anno decimo tertio ejusdem Reginæ habito, declaratum erat per universos Regni ordines: Quod plurimi seditiosi & scelerati machinantes & molientes, seditiose & scelerate non solum hoc Regnum & imperialem ejusdem Coronam (quæ revera ex se sunt liberrima) sub jugum exteræ, usurpatæ & injustæ jurisdictionis, præheminentiæ, & authoritatis a Romana sede sibi arrogatæ redigere: Verum etiam subditorum animos a suo Principe, & a debita observantia abalienare, seditionemq; turbulentam & rebellionem intra hoc Regnum concitare, nuper procurarunt & impetrarunt sibi a Romano Pontifice, & ejus sede, diversas Bullas, eo consilio ut eos absolverent & reconciliarent, quotquot parati essent debitam erga Principem obedientiam projicere, & semetipsos ementitæ, injustæ & usurpatæ illius authoritatis jugo subjicere. Sub obtentu etiam earundem Bullarum & rescriptorum illi clandestino & seditiosissime in illis Regni hujus partibus, ubi populus minus instructus, infirmissimus, simpliciſſimus, & imperitissimus erat, atque inde suum officium erga Deum & principem minus intellexit, subdolis nefariis & clan-

hereafter appeareth) followed: And therefore at a Parliam, holden in the xiii Year of her Reign, it was declared by the whole Body of the Realm: That divers seditious and very ill disposed People, minding very seditiously and unnaturally, not only to bring this Realm, and the imperial Crown thereof (being in very Deed of it self most free) again into the Thraldom and Subjection of the foreign usurped and unlawful Jurisdiction, Preheminence, and Authority claimed by the said Sea of Rome, but also to estrange and alienate the Minds and Hearts of sundry the Q.'s Subjects, from their dutiful Obedience, and to raise and stir Sedition and Rebellion within this Realm, did then lately procure and obtain to themselves, from the said Bishop of Rome, and his said Sea, divers Bulls and Writings, the Effect whereof had been, and then was, to absolve and reconcile all those that would be contented to forsake their due Obedience to the Queen, and to yield and subject themselves to the said fained unlawful and usurped Authority: And by Colour of the said Bulls and Writings, the said Persons very secretly and most seditiously in such Parts of this Realm, where the People for want of good Instruction were most weak, simple and ignorant, and thereby furthest

The Statute of 13 Eliz.

from the good Understanding of their Duties towards God and the Queen, did by their lewd and subtil Practises and Persuasions so far forth work, that sundry simple and ignorant Persons, had been contented to be reconciled to the said usurped Authority of the See of Rome, and to take Absolution at the Hands of the said naughty and subtil Practisers, whereby did grow great Disobedience and Boldness in many not only to withdraw and absent themselves from all Divine Service, then most godly set forth and used within this Realm; but also have thought themselves discharged of and from all Obedience, Duty and Allegeance to her Majesty, whereby most wicked and unnatural Rebellion did ensue, and to the further Danger of this Realm, was thereafter very like to be renewed, if the ungodly and wicked Attempts in that behalf were not by Severity of Laws in Time restrained and bridled: For Remedy and Redress whereof, and to prevent the great Mischiefs and Inconveniences that thereby might ensue; It was enacted by the Queen, with the Assent of the Lords Spiritual and Temporal, and the Commons in that Parliament assembled, and by the Authority of the same, That if any Person or Persons after the first Day

Note the Fruits of the Bull.

1.

2.

3.

4.

The Parts of the Act.

1.

destinis machinationibus & persuasionibus eo usq; processerunt, ut nonnulli simplices & imperiti, prædictæ usurpatæ authoritati sedis Romanæ sese reconciliarent & a nefariis illis & subdolis machinatoribus absolvi voluerint; unde magna inobedientia & audacia in multis adeo prorupit, ut non solum a Divino cultu religioseque instituto, & in hoc Regno usitato abessent; verum etiam se omni obedientia, obsequio, & fide erga Principem solutos existimarint, & hinc seditio nefaria & rebellio concitata fuit & ad majus hujus Regni discrimen postea (ut probabile est) concitanda esset, nisi nefarii illi conatus legum severitate opportune cohibiti fuissent: Quibus incommodis & malis indies emergentibus ut provideretur, & remedium adhiberetur, per Reginam cum assensu Dominorum Spiritualium & Temporalium necnon Communitatis in Parliamento, & ejusdem authorirate sancitum est; quod si quis a primo die Julii proxime subsequente, in quocunque hujus Regni loco, & Reginæ Dominiis, uteretur aut exoqueretur aliquam ejusmodi Bullam, rescriptum, vel instrumentum absolutionis vel reconciliationis, scripto vel

typ

pis impreſſa, antea impe-
ata, & poſtea impetranda
Pontifice Romano, ejus
ceſſoribus, vel a quibuſ-
nque aliis qui authorita-
m a Pontifice Romano
us prædeceſſoribus, vel
ceſſoribus, vel ſede Ro-
ana, habent, vel ſibi
ſumunt; Vel ſi quis a
imo illo die Julii ſub
rætextu alicujus ejuſmodi
ullæ, reſcripti, inſtrumen-
, aut authoritatis, ali-
uem abſolvere, aut recon-
liare ſuſceperit; vel con-
edere aut promittere ali-
i in hoc regno, aut aliis
eginæ Dominiis, ullam
juſmodi abſolutionem vel
conciliationem, loquendo,
rædicando, docendo, ſcri-
endo, vel quovis facto
perto; Vel ſi quis in hoc
egno, vel aliis Reginæ
ominiis a primo illo die
ulii aliquam ejuſmodi ab-
olutionem vel reconciliati-
nem ſponte acceperit:
el ſi quis impetraverit a
oſtremo die parliamenti
nno primo ejus regni
abiti, vel a primo illo die
ulii impetrabit a Pontifice
Romano, vel ejus ſucceſſo-
ibus, aut ſede Romana,
liquam bullam, ſcriptum,
nſtrumentum ſcriptum, vel
ypis impreſſum, de re vel
cauſa quacunq; vel aliquam
ejuſmodi bullam, reſcrip-
tum, vel inſtrumentum,
ullo modo publicaverit, qd'
omnia & ſingula ejuſmodi

of July then next coming, ſhould uſe or put in ure in any Place within this Realm, or in any the Q.'s Dominions, any ſuch Bull, Writing, or Inſtrument, written or printed of Abſolution or Reconciliation, at any Time theretofore obtained and gotten, or at any Time thereafter to be obtained or gotten from the ſaid By. of Rome, or any his Succeſſors, or from any other Perſon or Perſons, authoriſed or claiming Authority, by or from the ſaid By. of Rome, his Predeceſſors or Succeſſ. or See of Rome: Or if any 2.
Perſon or Perſons, after the ſaid firſt Day of July, ſhould take upon him or them by Colour of any ſuch Bull, Writing, Inſtrum. or Author. to abſolve or reconcile any Perſon or Perſons, or to grant or promiſe to any Perſon or Perſons, within this Realm, or any other the Q.'s Domin. any ſuch Abſolut. or Reconciliat. by any Speech, Preaching, Teaching, Writing, or any other open Deed; Or if any o- 3.
ther Perſon or Perſons within this Realm, or any the Q.'s Dominions after the ſaid firſt Day of July, ſhould willingly receive and take any ſuch Abſolution or Reconciliation: Or elſe if any Per- 4.
ſon or Perſons had obtained or gotten ſithence the laſt Day of the Parliament holden in the firſt Year of her Reign, or after the ſaid firſt Day of July, ſhould obtain

or

or get from the said By, of Rome, or any his Successors, or See of Rome, any Manner of Bull, Writing, or Instrument, written or printed, containing any Thing, Matter or Cause whatsoever, or should publish, or by any Ways or Means put in ure any such Bull, Writing, or Instrument; That then all and every such Act or Acts, Offence and Offences, should be deemed and adjudged by the Authority of the said Act to be High Treason, and the Offender and Offenders therein, their Procurers, Abettors and Counsellers to the Fact and committing of the said Offence or Offences, should be deemed and adjudged High Traitors to the K. and the Realm, and being thereof lawfully indicted and attainted, according to the Course of the Laws of this Realm, should suffer Pains of Death; and also lose and forfeit all their Lands, Tenements, Hereditaments, Goods and Chattles, as in Cases of High Treason, by the Laws of this Realm ought to be lost and forfeited, as by the said Act appeareth.

And albeit many of her Subjects after the said Bull of Pius Quintus, adhering to the Pope did renounce their former Obedience to the K. in respect of that Bull, yet all this time no Law was either made or attempted against them for their Recusancy tho' it were grounded upon so disloyal a Cause.

facta & delicta, authoritate ejusdem statuti crimen læsæ Majestatis habeantur & adjudicentur. Quodque, qui in his deliquerint, & eorum procuratores, fautores, & consultores in his factis, & delictis, læsæ Majestatis rei contra Reginam & regnum habeantur & adjudicentur; atque, inde legitime accusati & condemnati, juxta legum hujus regni præscriptum, extremo supplicio afficiantur; terræ, tenementa, hæreditamenta, bona & facultates in fiscum redigantur, ut in causis læsæ Majestatis per leges hujus regni fieri solet, ut ex eodem statuto liquido apparet.

Quamvis autem ex hac *Pii Quinti* bulla, quamplurimi subditi Pontifici Romano adhærentes, pristinam obedientiam erga Reginam reliquerint, nulla tamen lex lata aut rogata fuit contra eos de recusatione, quamvis illi tam injustæ causæ inniterentur. Cum autem Statuta parli-

rliamentario, declaratum
ſet, hoc brutum bullarum
men tot & tanta pericula
eipublicæ intuliſſe, in ea-
m loco Jeſuitæ, & Sacri-
i Romanenſes huc ſunt
iſſi, qui latitantes in a-
mos quamplurimorum
peritorum ſubditorum
jus regni immurmura-
nt, & inſtillarunt, quod
ontifex Romanus autho-
atem Reges & Principes
xcommunicandi & abdi-
ndi habeat, quod ille
eginam excommunicaſſet,
gno abdicaſſet, ſubditoſ-
ne omnes fidelitatis & ob-
quii vinculo abſolviſſet;
proinde nec ipſi nec e-
s mandatis aut legibus
b pœna anathematis ob-
mperandum. Hoc per
ntiquas Angliæ leges cri-
en erat Majeſtatis læſæ
ſummo gradu: Et inde
ampianus, Sherwinus, &
luresaliiSacerdotesRoma-
enſes apprehenſi, & con-
eſſi, quod in Angliam ve-
erint ad Cauſam Catholi-
am Romanam firmandam
um opus eſſet, anno præ-
ictæ Reginæ 21 per anti-
uas communes Angliæ le-
es fuerunt in queſtionem
ocati, accuſati, auditi,
ondemnati, & extremo
upplicio affecti, ob crimen
eſæ majeſtatis, contra fidem
uam ſuo Principi debeant.
Nec adhuc aliquod ſtatu-
um parliamentarium con-
ra Recuſantes, Jeſuitas, aut

Now that theſe ſpeechleſs Bulls were declared by Act of Parliam. to be ſo dangerous, then in place of them Jeſuits and Romiſh Prieſts were ſent over, who in ſecret Corners whiſpered and inſuſed into the Hearts of many of the unlearned Subjects of this Realm, that the Pope had Power to excommunicate and depoſe Kings and Princes, that he had excommunicated the late Q. deprived her of her Kingdom, and diſcharged all her Subjects of their Oath, Duties and Allegiance to her; And therefore they ought not to obey her, or any of her Commandments or Laws, under pain of the Pope's Curſe. This was High Treaſon by the antient Laws of England; And thereupon Campion, Sherwin, and many other Romiſh Prieſts being apprehended, and confeſſing that they came into England to make a Party for the Catholick Cauſe when need ſhould require, were in the 21 Year of the ſaid late Q.'s Reign, by the antient Common Laws of England, indicted, arraigned, tried, adjudged, and executed, for High Treaſon againſt their natural Allegiance which they ought their Leige Sovereign. But all this Time there was no Act of Parliam. made either againſt Recuſants, or Jeſuits, or Prieſts, her Majeſty ſtill deſiring and expecting there

Conver-

Conversion, and that by Clemency and Mildness they might be reclaimed to their former Obedience and Conformity before the said Bull. After Priests and Jesuits were punished by Sentence of Law, according to their Demerits, then great Numbers of slanderous and seditious Books (libri falsidici) against her Majesty and the State, were dispersed and scattered within this Realm, tending to the inciting and stirring of the Subjects to Insurrection and Rebellion.

The Statute of Anno 23 Reg. Eliz.

Her Majesty in open Parliament, having with the Lords Spiritual, Temporal, and Commons, mature Consideration of so weighty and important Causes, in the 23 Year of her Reign made two several Laws: One against the Makers and Publishers of seditious Books, ordaining that Offence to be Felony: Another against Recusants, inflicting the Penalty of twenty Pounds the Month for their Recusancy: And yet upon their Submission according to the Act, to be thereof freely and absolutely discharged: (a mild and merciful Law, considering their former Conformity, and the Cause of their Revolt.) But after these Jesuits and Romish Priests coming daily into and swarming within the Realm, instilling still this Poison into the Subjects Hearts, that by Rea-

Sacerdotes sancitum erat, cum sereniſſima Regina nihil magis in votis habuit, quam ut converterentur, & ad priſtinam obedientiam quam ante illam Bullam emiſſam præſtiterant, clementia & lenitate revocarentur. Poſtea autem in Sacerdotes illos & Jeſuitas merito legis ſententia animadverſum erat; inde famoſi & ſeditioſi libelli, (*libri falſidici*) contra Regiam Majeſtat' & Statum editi in hoc reg', & diſperſi erant, ad tumultum conflandum, & ſeditionem concitandum.

Regina in pleno parliamento, matura deliberatione habita cum Dominis Spiritualibus & Temporalibus, de rebus tantis tantique momenti, anno 23 regni duo ſanxit ſtatuta: Alterum contra authores & divulgatores ſeditioſorum librorum, feloniæ pœnam illis infligens: Alterum contra Recuſantes viginti librarum mulctam in ſingulos menſes pro recuſatione imponens, nihilominus ſi ſe ſubmiſerint juxta ſtatutum illud, inde eſſe abſolutos & liberatos: (mitis ſane & benigna lex, ſi ad priſtinam conformitatem & defectionis eorum cauſam reſpiciamus:) Poſtea autem Jeſuitæ & Sacerdotes Romanenſes indies in hoc regnum influentes, & in animos homi-

hominum hoc venenum infundentes, quod per illam *Pii quinti* bullam Regina fuerat excommunicata, regno abdicata, ſubditiq; ſui omni erga ipſam fide & obſequio exempti, omne faxum moverant, ut ipſos a fide qua Regiæ Majeſtati erant obſtricti abſtraherent, & Eccleſiæ Romanæ reconciliarent. Hinc anno regni ſui 27. parliamentaria authoritate ſtatuit, crimen eſſe læſæ Majeſtatis, ſi quis Jeſuita vel Sacerdos Romanenſes nativus hujus regni ſubditus ſacris Romanis initiatus, aut in Jeſuitarum ſocietatem admiſſus jam inde a regni ſui initio, Dominia ſua adiret, eo concilio ut ipſos inde arceret, ne ſubditos perfidis illis & pernitioſis perſuaſionibus & machinationibus, ut jam dictum eſt, contaminarent, quæ proculdubio læſæ Majeſtatis in ſummo gradu erant crimina per antiquas communes Angliæ leges: Nec quis ſane Regum Angliæ animo erecto, ex quo hæc Monarchia primum firmata fuerit, eorum vitæ (potiſſimum ſi nativi ſubditi erant) pepercifſet, qui ſubditis perſuaſiſſet illum de jure non fuiſſe Regem, molituſq; fuiſſet intra hoc regnum eos a fide & obſequio erga Regem ſuum abducere, qd' per antiquas

ſon of the ſaid Bull of Pius 5. her Majeſty was excommunicated, deprived of her Kingdom, and that her Subjects were diſcharged of all Obedience to her, and by all Means endeavoured to withdraw them from their Duty and Allegiance to her Majeſty and to reconcile them to the Church of Rome. In the 27. Year of her Reign, by Authority of Parliam. her Majeſty made it Treaſon for any Jeſuit or Romiſh Prieſt being her natural born ſubject, and made a Romiſh Prieſt or Jeſuit ſithence the Beginning of her Reign, to come into any of her Dominions, intending thereby to keep them out of the ſame, to the End that they ſhould not infect any other Subjects with ſuch treaſonable and damnable Perſuaſions and Practiſes, as are aforeſaid, which without Controverſy were High Treaſon by the ancient Common Laws of England: Neither would ever magnanimous King of England, ſithence the firſt Eſtabliſhment of this Monarchy, have ſuffered any (eſpecially being his own natural born Subjects) to live, that perſuaded his Subjects that he was no lawful King, and practiſed with them (within the Heart of this Realm) to withdraw them from their Allegiance, and Loyalty to their Sovereign, the ſame

The Statute de Anno 27 Eliz. Reginæ. 3 Inſt. 101.

same being crimen læsæ Majestatis, by the ancient Laws of this Realm.

By this and by all the Records of the Indictments it appeareth, that these Jesuits and Priests, are not condemned and executed for their Priesthood and Profession, but for their treasonable and damnable Persuasions and Practices against the Crowns and Dignities of Monarchs, and absolute Princes, who hold their Kingdoms and Dominions by lawful Succession, and by inherent Birth-right and Descent of Inheritance, (according to the fundamental Laws of this Realm) immediatly of Almighty God, and are not Tenants of their Kingdoms (as they would have it) at the Will and Pleasure of any foreign Potentate whatsoever.

Now albeit the Proceedings and Process in the ecclesiastical Courts, be in the Name of the Bishops, &c. It followeth not therefore, that either the Court is not the King's, or the Law whereby they proceed is not the (a) King's Law: For taking one Example for many, every Leet or View of Frank-pledge holden by a Subject, is kept in the (b) Lord's Name, and yet it is the King's Court, and all the Proceedings therein are directed by the King's Laws, and many Subjects in Engl. have

(a) Cawley 142.

(b) Cawley 142.

huius regni leges crimen erat læsæ Majestatis.

Hinc ex actis publicis, in quæ eorum accusationes relatæ sunt, luce clarius est, quod Jesuitæ & Sacerdotes illi, non sunt condemnati & supplicio affecti, eo quod sint Sacerdotes, & contrariam religionem professi, sed quod proditoriis & execrandis persuasionibus & machinationibus moliti sint contra Coronam & Majestatem Monarcharum, & Principum absolutissimorum, qui sua Regna & Dominia immediate a summo Deo legitima successione, & jure avito atq; hæreditario, juxta leges fundamentales tenent & non (ut ipsi somniant) ex alterius cujuscunq; Principis exteri nutu & arbitrio.

Quamvis autem procedendi formulæ & processus in Curiis Ecclesiasticis sint sub Episcoporum, &c. nominibus; non igitur sequitur Curias illas non esse Regis vel legem juxta quam procedunt, non esse Regis legem. Sit hoc exemplum instar multorum; quilibet visus Franc' pleg' a subdito in nomine Domini sui tenetur, & tamen Regis est Curia, & omnes in ea processus ad Regis leges diriguntur, subditiq; quamplurimi Curias ex

recordo, & alias in Ang- tenent, juxta tamen Re- s leges, & Regni consue- dines in iis procedunt.

Observes hic (candide ctor) quandoquidem de- fio & determinatio hære- um, schismatum, & erro- m in religione, ordina- onum, examinationum, dmissionum, institutio- um, & deprivationum ominum ecclesiasticorum quæ ad Dei cultum, & eram religionem spec- nt) matrimoniorum, di- orniorum, bastardiæ ge- eralis (unde stirpium & ereditatum validitas de- endet) probationis testa- entorum, literarum ad- inistrationum (sine qui- us nullum debitum de- unctis per legem commu- em recuperari possit) mor- uariorum, pensionum, pro- urationum, reparationum cclesiarum, simoniæ, in- estus, adulterii, fornica- ionis, incontinentiæ, & quo- undam aliorum ad com- unem legem non spec- ant, quam necessarium uerit ad justitiam exercen- dam & administrandam, quod Regiæ Majestatis Pro- genitores hujus regni Mo- narchæ, Ecclesiasticas sub ip- is Curias authoritate arma- verint, determinandi causas illas Ecclesiasticas tanti mo- menti (a communis legis urisdictione exemptas) per and hold Courts of Record, and other Courts, and yet all their Proceedings be according to the King's Laws and Customs of the Realm.

Observe (good Reader) seeing that the Determination of Heresies, Schisms, and Errors, in Religion, Ordering, Examinat. Admiss. Institut. and Deprivation of Men of the Church (which do concern God's true Religion and Service) of Right of Matrimony, Divorces, and general Bastardy, (whereupon depend the Strength of Mens Descents and Inheritances) of Probate of Testam. and Let. of Administrat. (without which no Debt or Duty due to any dead Man can be recovered by the Com. Law) Mortuaries, Pensions, Procurat. Reparat. of Churches, Simony, Incest, Adultery, Fornication, and Incontinency, and some others, doth not belong to the Com. Law, how necessary it was for Administration of Justice, that his Majesty's Progenitors Kings of this Realm did by publick Authority authorise ecclesiastical Courts under them, to determine those great and important Causes Ecclesiastical, (exempted from the Jurisdiction of the Com. Law) by the King's Laws Ecclesiastical, which was done originally for two Causes. 1. That Justice should be administred under the Kings of this Realm, within

within their own Kingdom, to all their Subjects, and in all Causes. 2. That the Kings of England should be furnished, upon all Occasions either foreign or domestical, with learned Professors as well of the Ecclesiastical, as Temporal Laws.

Thus hath it appeared as well by the ancient Common Laws of this Realm, by the Resolutions and Judgments of the Judges and Sages of the Laws of England, in all Succession of Ages, as by Authority of many Acts of Parliament, ancient, and of later Times, that the Kingdom of England is an absolute Monarchy, and that the King is the only supream Governor, as well over ecclesiastical Persons, and in ecclesiastical Causes, as temporal within this Realm, to the due Observation of which Laws, both the King and the Subject are sworn. I have herein cited the very Words and Texts of the Laws, Resolutions, Judgments, and Acts of Parliament, all publick and in print, without any Inference, Argument, or Amplification; and have particularly quoted the Books, Years, Leaves, Chapters,, and such like certain References, as every Man may at his Pleasure see and read the Authorities herein cited. This Case is reported in the English and Latin Tongues (as some other

leges Regis ecclesiastic qd' initio duabus de cau factum. Primo ut justi sub regni hujus Regib omnibus suis subditis, & omnibus causis adminis tur. Secundo, ut Angl' R ges peritos professores l gum tam ecclesiasticar quam temporali' in pro tu semper haberent, qu cunq; occasio tulerit, sive la externa, sive domesti

Jam pateat, & in pro tu sit, tam ex antiquis co munibus hujus regni le bus, Judicum & Juris dentissimorum in An sententiis & judiciis, fin lis seculis, quam ex aut ritate plurimorum statu rum parliamentarior' p cis temporibus, & rec memoria; quod Regn Angliæ sit Monarchia a luta; quodque Rex s & summus sit guberna tam personarum eccles carum, & in causis eccle asticis, quam temporali & in temporalibus intra regnum: Ad quas leg sancte & inviolate obser das, & Rex & subditi ju jurando obstricti tenen Legum autem, senten rum, judiciorum, & stat rum parliamentarior', q singula publice typis imp sa prostant, ipsissima verb textus sine ulla illatione, gumentat', aut amplif tione allegavi; libros v

nnos, paginas, & id genus
ia ſigillatim adnotavi, ut
uilibet pro arbitrio oculis
tueatur & legat: Anglice
Latine edidi (qd' & non-
lli noſtri juris ſcriptores
cerunt) eo conſilio, ut con-
ves chariſſimi in Reg' hu-
s legibus, ipſorum jure a-
o & hæreditario, necnon
uſtribus ejuſd' juris indi-
s hac in parte non ſint pe-
grini: Ad veritatem per-
ſus, quod nemo ex An-
orum gente modo ſanus, &
genue ſincerus, qui perſua-
antequam informatus fu-
at, in veritate (quam ipſe
ulis intueatur ſuis) abnu-
ne ab errore diſſuadere-
r, quo obcæcatus ſit ab-
ctus; Miſere enim cum
agitur, & miſericordia
gnus, qui fuit perſuaſus
uſquam informatus, &
nc informari abnuit, quia
rſuaderi nolit.

Writers of the Law have done to the End that my dear Countrymen may be acquainted with the Laws of this Realm, their own Birth-right and Inheritance, and with ſuch Evidences as of Right belong to the ſame; Aſſuring my ſelf that no wiſe or true hearted Engliſhman, that hath been perſuaded before he was inſtructed, will refuſe to be inſtructed in the Truth, (which he may ſee with his own Eyes) leaſt he ſhould be diſſuaded from Error, wherewith blindfold he hath been deceived: For miſerable is his Caſe, and worthy of Pity, that hath been perſuaded before he was inſtructed, and now will refuſe to be inſtructed, becauſe he will not be perſuaded.

Caſes

Cases of Leases.

Mich. 27 & 28 Eliz.

In the King's Bench.

Clayton's *Case.*

Ejectione firmæ between *Clayton* and *Presenham*, of Latch 61.
Lands in *Lichborow* in the County of *North.* the Case
such; Indentures of Demise were ingrossed bearing Date
Maii, anno 25 *Eliz.* of Land in *L.* to have and to hold
three Years from henceforth) and the said Indentures
were delivered at four of the Clock in the Afternoon, the
Day of *June, anno* 25 *supradicto:* And when this
Case by Computation should have its Beginning, whether
from the Day of the Date, or from the Delivery was the
Question. And in this Case three Points were resolved by
the Chief Justice, Sir *Thomas Gawdy*, and the whole
Court.

1. That (*a*) (*from henceforth*) should be accounted from
the Day of the Delivery of the Indentures, and not by any
Computation of Date; for, *from henceforth* is as much as to
say, *from the making*, or *from the Time of the Delivery of
the Indentures*, or (*b*) *a confectione præsentium*; for the
Execution or making of the Lease does begin by the Deli-
very, and these Words (*from henceforth*) or any other
Words of the Indenture, are not of any Effect or Force un-
less by Delivery, *quia traditio loqui facit chartam.*

(*a*) Co. Lit. 46. b. Cr. Jac. 258. Wing. Max. 13.

(*b*) Co. Lit. 45. b. 2 Rol. 510. 1 Inst. 94 a. C. Jac. 647. Pow. 108. b Wing. Max. 13. Perk. sect. 1.

2. That where the said Indenture was delivered at 4 of the
Clock in the Afternoon of the said 20 of *June*, it was resolved,
that this Lease should end the 19th Day of *June* in the 3d Year,

for the Law in this Computation doth reject all (*a*) Fractions and Divisions of a Day for the Incertainty, which is always the Mother of Confusion.

3. That in this Case the Day of the Delivery of the Lease should be taken *inclusive*, and the Day itself is Parcel of the Demise; so where the Demise is limited to begin from the Making; but if the Lease be to begin from the Day of the Making, (*b*) or from the Day of the Date, there the Day itself of the Date is excluded, and so the Doubt in 12 *Eliz. Dier* 286. well explained, and with this Resolution agrees 14 *Eliz. Dier* 307. And it was adjudged in the *Common Pleas*, *Trin* 21 *Eliz.* where the Words of the Stat. of 27 *H.* 8. *cap.* 16. of Inrolments are (*within six Months after the Date of the same Writings indented*) that if such Writings have a Date, the six Months should be accounted from the Date, and not from the Delivery; but if they have no Date, then the six Months should be accounted from the Delivery. *Vide Dier*, 5 *Eliz.* 218. An Indenture of Bargain and Sale bore Date the fourth Day of *October*, 4 & 5 *Phil. & Mar.* was (*c*) inrolled the 21st Day of *March* next following, which was the last Day of the six Months, accounting the Day of the Date *exclusive*. And it was adjudged on Demurrer in the *Common Pleas* (which Plea began 4 *Eliz. Rot.* 812.) that the Deed was well inrolled within the said Act; for the whole Day of the fourth of *October* should be accounted in Law the Date of the Indenture, *unde sequitur*, *That from the Date* (*d*) *and from the Day of the Date*, are all of one Sense, forasmuch as in Judgment of Law, the Date doth include the whole Day of the Date.

(*a*) 1 Brownl. 125. Moor 879. Cowly 198. 2 Rol. 521. 3 Inst. 53.

(*b*) Hob. 140. Alleyn 77. Cr. Jac. 135, 136, 258, 647. Co. Lit. 46. b. Post 94. a. 2 Rol. 520. 1 Rol. Rep. 387, 388. Owen 50 1 Bulstr. 177. 2 Bulstr. 83. 3 Bulst. 203. 2 Cr. 264.

(*c*) Hob. 139, 140. Moor 40, 41, 42, 879. Dall. in Kelw. 205. pl. 6. Dall. in Ash. pl. 6. 2 Inst. 674. Yelv. 100. Latch 14, 60. Dall. 41, 42. 1 Rol. Rep. 387. 3 Bulst. 203. Dyer 218. pl. 6. 286. pl. 43. Co. Lit. 46. b.

(*d*) Cr. Jac. 136. 1 Rol. Rep. 387. 3 Bulst. 204 Salk. 413, 625.

Trin. 30 Eliz. *Reg.*

In the King's Bench.

ELMER's *Case.*

BEtween *Elmer* (a) Bishop of *London*, and *Gale* Defendant for the Scite of the Manor of *Drayton* in *Midd.* two Points were resolved.

1. That the Statute of (b) 1 *Eliz.* is a private Act, whereof the Court without pleading of it would not take Notice.

2. It was resolved, That where the said Scite Parcel of the Bishoprick was in Lease for Years, and *Grendal* the Bishop ousted the Lessee, and made a Lease (which was confirmed by the Dean and Chapter) for three Lives, rendering the ancient and accustomed Rent; that this Lease was voidable by the (c) Successor. 1. Because the Statute of 1 *Eliz.* was in the Disjunctive for 21 Years or three Lives, and therefore the Bishop could not make both: But if in the Case at Bar the said Lease should be good, then the Bishop might make a Lease for 21 Years, and presently after make a Lease for three Lives, which would be against the Words and Meaning of the Act. 2. The Rent reserved on the Lease is not payable within the Meaning of the said Act; for although *ex vi termini* it is payable, because after the Lease for Years determined, the Successor might distrain for all the Arrearages of the Rent reserved on the Lease for Lives; yet it is not payable within the Meaning of the Act, for the Act was made to maintain Hospitality, and to avoid Dilapidations, and that cannot be but by a continual Revenue yearly payable by Compulsion of Law, and not in Expectancy, or *in futuro.* For (d) Possibilities neither maintain Hospitality nor repair Churches; and in this Case the Bishop would have but a Possibility; for the Lessees for Lives would have the Rent reserved on the Lease for Years, and if they

(a) 10 Co. 60. b. Moor 253. Hard. 89. 2 Brownl. 164. Winch. 47.

(b) Rast. Leases 4. Cr. Jac. 112. 4 Co. 76. a. Doct. plac. 337. Moor 108, 253. 1 And. 65, 66, 153. 3 Leon. 59. Cr. El. 141. 2 Brown. 164. Co. Lit. 45. a. Palm. 467, 468. Latch 241. Cr. Car. 50. 10 Co. 60. a. b.

(c) 3 Co. 60. a. Co. Lit. 45. a. Cr. El. 473, 474, 564. 10 Co. 59. a. 3 Keb. 109. 1 Mod. Rep. 209. Cart. 13, 16. 1 Vent. 247. 1 Rol. Rep. 152, 154, 156, 169.

(d) Bridg. 122.

(a) 10 Co. 60. a. 3 Co. 50 b. 5 Co. 6. a. 6 Co. 37. a. 7 Co. 7. b. 8 Co. 34. a. 72. a. 9 Co. 140. b. Co. Lit. 44. a. 333. a. Plow. 112. b. Raft. Leases 2. Dyer 72. pl. 3. 162. pl. 48, 191. pl. 22, 246. pl. 69. 271. pl. 28 357. pl. 43, 363 pl. 26. Savil 85. pl. 165. Cr. Jac. 173. Cr. Car. 22, 44, 435. 1 Rol. Rep. 159, 163, 230. 2 Rol. Rep. 169, 311, 332, 405, 410, 491, 499. Hob. 204. Latch. 45. Bridg. 28. Moor 58 75 , 783 1 Leon. 59, 148. 3 Leon. 132, 196. 1 Jones 60. 2 Inst. 342, 681. Godb. 102. pl. 119. 3 Keb. 381. Cr. El. 350, 602. (b) Moor 783. Hutt. 8. Lit. Rep. 131. Hob. 204. Co. Lit. 44. b.

survive the Lease for Years, then the Bishop and his Successors would have remedy for the Rent and Arrearages reserved on the Lease for Lives, as it hath been said. And it was said, That where the Statute of *(a)* 32 *H.* 8. *cap.* 28. provides, *That the old Lease be surrendered within one Year, &c.* that a Surrender (*b*) conditional is not within the said Act: For the Intent of the Makers of the Act was to have a continual and absolute Surrender, and not such illusory Surrender, which might be avoided the next Day; for *factum non dicitur quod non perseverat*; and *Sensus verborum est anima legis.* But in the principal Case Judgment was given against the Bishop, for not pleading the said Statute of 1 *Eliz.*

Trin. 30 Eliz. *Reg.*

In the King's Bench.

Jewel's *Case.*

BEtween *Paul* and *Maior* the Case was; (a) *Jewel* Bishop of *Salisburry* 6 *Eliz.* by Deed indented made a Lease of a Fair, Parcel of the Possessions of his Bishoprick, with all Profits thereof in *Sherburn* in the County of *Dorset* for three Lives, rendering *the old and accustomed Rent*, which was confirmed by the Dean and Chapter; and afterwards the Bishop died, and if this Lease was good against the Successor, and not restrained and made void by the Statute of (b) 1 *Eliz.* not printed was the Question. And it was adjudged that the Successor should avoid the Lease; for a Fair is but a Franchise or Liberty, not manurable, out of which a (c) Rent cannot be reserved; and therefore for such Rent reserved the Lessor or his Successors have not any Remedy, either by Distress or Assize; and all Leases of such Inheritances, out of which the antient and accustomed Rent cannot be well and lawfully reserved, are voidable by the said Act. It was also resolved, that if the Lease had been made for 21 (d) Years, rendering *the antient and accustomed Rent*, the Successor should avoid it; for although the Rent reserved should be good by Way of (e) Contract betwen the Lessor and the Lessee, yet it is not incident to the Reversion, nor shall go with it; and therefore such Lease should be also voidable by the Successor by the said Statute. *Vide* 17 *E.* 3. 75. *b.* 9 *Ass. p.* 24. (f) 30 *Ass. p.* 5. 14 *E.* 3. *Scire* (g) *facias* 122. 10 *H.* 6. 2. 3 *H.* 6. 21, &c.

(a) 10 Co. 60 b

(b) Ley's Rep. 77. 5 Co. 2. a. Rast. Leases 4. Cr. Jac. 112. 4 Co. 76. a. Doct. plac. 337. Moor 108, 253. 1 And. 65, 66, 193 3 Leon. 59. Cr. El. 141. Co. Lit. 45. a. 2 Brownl. 164. Palm. 105, 467, 468. Latch. 241. Cr. Car. 50. 10 Co. 60. a. b.

(c) 7 Co. 23. b. Co. Lit. 44. b. 142. a. Post. 4. a. Cr Jac. 111, 112. Moor 163, 168. 2 Rol. 446.

Cr. El. 690 2 Sand. 303. Vaugh. 203. Raym. 194. Moor 778.

(d) Cr. Jac 112. 2 Sand. 304.

(e) 2 Sand. 303.

(f) Postea 4. a.

(g) Post. 4. a.

Mich. 31 & 32 Eliz.

In the King's Bench.

The Lord MOUNTJOY's *Case.*

Moor 197, 494. Hardr. 89, 92, 397. 3 Keb. 192, 373, 378, 380, 583, 596, 597. Lit. Rep. 305.

Richard Shephard was Plaintiff against *Blackaller* Defendant in an *Ejectione firmæ* of two Houses and 18 Acres of Land in *Hemston Arundel*, on a Demise made 10 *Apr.* 28 *Eliz.* for three Years; the Defendant pleaded not guilty, and the Jurors, as to the Moiety of one House and 18 Acres of Land, found the Defendant guilty, and as to the Residue they have a special Verdict to this Effect: They found that the Tenements in which, &c. were Parcel of the Manor of *Hemston Arundel*, and demised and demisable Time out of Mind, by Copy, &c. And that *Robert* Lord *Brook* was seised of the said Manor in Fee, and further found that by a special Act of Parliament made 4 *Feb.* 27 *H.* the said Manor was intailed to *Anne* Wife of *Charles* Lord *Mountjoy*, and to *John Pawlet* and *Elizabeth* his Wife, and to the Heirs of their Bodies begotten with divers Remainders over; by which Act it was provided as follows, *scil.* That the Donees, nor any of them, *non facerent aliquid detrimentum, vel exhæredationem hæredum suorum vel eorum alicujus, vel alicujus eorum in remanere, sed tantum pro junctura uxoris pro termino vitæ, vel alicujus viri, & pro termino vitæ, vel pro termino vitæ alicujus aliæ personæ vel pro annis, vel ad voluntatem, secundum consuetudinem manerii; reddend' verum & antiquum reddit' prædictarum terrarum, & tenementorum sic demissorum, & quod* all other Acts should be void, as by the said Act appears: And further found, that the said Manor did consist of divers free Rents amounting to 7 *l.* and of 15 Copyhold Tenements which were held for Lives, the customary Rent of which was

M. and of the Demesnes which had usually been demised by Indenture for the several Rents and Farms of 7 *l.* &c. And that there was one Acre of Waste, Parcel of the said Manor, in which were divers Highways, and Common for the Ten'ts of the yearly Value of 12 *d.* And that on the Death of every Copyholder, the Lord by Custom ought to have an Heriot; and that there was a Court-Baron incident to the said Manor, and Perquisits of Court, and a Leet appertaining to the said Manor; and that the Free Rents, or Copyhold Rents, or Heriots, or Perquisits of Court, or Leet, never were demised before for Life, or Years, or otherwise; and that afterwards *Cha.* L. *Mountjoy* died, after whose Death the said *Anne* his Wife in 6 *Eliz.* did accept a Fine of a Stranger, *sur conusans de droit come ceo*, &c. of the Moiety of the said Manor with the Appurtenances, and of a great Number of Acres which did comprehend the Demesnes; by which Fine the said *Anne* did grant and render the Moiety of the said Manor, &c. with the Appurtenances for 300 Years rendering Rent amounting to the free Rents, the Copyhold Rents, the Farm-Rents, and 18 *d.* more, and 12 *d.* for the Acre of Waste, to be paid at two Feasts of the Year, where the old Rent was payable at four Feasts. And afterwards the said *Anne* died, and the now Plaintiff claimed under the said Lease for 300 Years: And the Defendant claimed by the Lord *Mountjoy* that now is, being Heir to the said Intail. And the Doubt of this Case was, if the said Lease for 300 Years, made in Manner and Form aforesaid, was to be avoided by the said Clause of Restraint of the said Act of 32 *H.* 8. or not, and it was argued on the Plaintiff's Side (in which as much was said as the Wit of Man could think or invent) that the Lease should be good, and not restrained by the said Act. And all that which was said may be briefly divided into five Parts.

1. Forasmuch as this Act restrains the Power which the Tenant in Tail had by the Laws of the Land, it should be taken strictly, as to the Restraint, and beneficially for the Tenant in Tail: And to that Purpose the Rule put by *Read* 21 *H.* 7. 17. *b.* & 18 *E.* 4. 16. *a.* and divers other Books in that Ground were cited.

2. It was said, That although the Rents of Assize, Heriots, Leets, &c. were never demised before, it was not material; for the Rent reserved doth not (*a*) issue out of them, but only out of Things manurable, to which the Lessor may resort to distrain; as in 9 *Ass.* 24. A Lease of Land and of the Toll (*b*) of a Mill, rendering Rent, or in 30 *Ass.* 5. A Lease of Land and of (*c*) Hundred, or Advowson, rendering Rent, &c. all the Rent shall issue out of the Land, and not out of the Toll, Advowson, or Hundred. But the King may reserve a Rent out of a Fair, or other Thing not manurable, as is adjudged in 14 *E.* 3. (*d*) *Scire facias* 122. because he may (*e*) distrain for it in

(*a*) Antea 3. a. 7 Co. 23. b. Palm. 105. Co. Lit. 44. b. 142. a. 2 Rol. 446. Cr. Jac. 111, 112. Moor 163, 168. 2 Saund. 303, 304. Raym. 194. Cr. El. 690. Vaugh. 202.

(*b*) Br. Rents 11. Br. Tenure 26.

(*c*) Antea 3. a.

(*d*) Antea 3. a.

(*e*) Plowd. 239. a. 243. b. 343. a. Br. Prerogative 68, 77. Fitz. Grant 47. 44 E. 3. 45. a. Fitz. Prerogative 7. Br. Distress 6, 49. 13 E. 4. 6. a. 2 Inst. 131. 4 Inst. 119. 5 H. 7. 38. b. 5 Co. 56. a.

all the other Lands of the Grantee. *Vide* 10 *H.* 6. 2. And this Point was concluded with 12 *Aſſ. p.* 40. That if a Rent be granted out of a Manor, that the Demeſnes only *(a)* and not the Services are charged.

(a) B. Char. 19. 50. 14 H. 6. 24. Fitz. Charge 12.

3. Altho' the Acre of Waſte was never demiſed before, and altho' the Moiety was now demiſed, where no Moiety was demiſed of the Demeſnes before; and altho' the Rent was reſerved at two Days of the Year, where before it was reſerved at four Days of the Year, yet *verus & antiquus redditus* is reſerved within the ſaid Act: For every Rent hath Quantity and Quality, and *verus & antiquus redditus* is not to be intended of every Quality incident to it, but of the Quantity of the Rent, for that is the Effect and Subſtance of the Thing reſerved; as if the ancient Reſervation was of the Rent to be paid in Gold, *(b)* and the new Reſervation was to be paid in Silver; or if a Quarter of Wheat was anciently reſerved, and now *(c)* the Leaſe is made rendering eight Buſhels of Wheat, all is one; for the Law doth not reſpect the Form of Words, or the Quality, but the Subſtance and Effect of the Matter: So if the old Rent was 10 *l.* and the Leſſor reſerves *(d)* 20 *l.* this is not *ex vi termini verus & antiquus redditus*, *(e)* but *parum differunt quæ re concordant*, & *(f) quæ hæret in Litera, hæret in cortice.* And it is not neceſſary to have all the Qualities incident to an annual Rent; for if it were cuſtomary or copyhold Rent before, other Rent may now be reſerved by Indenture: For by that he ſhall have *verum & antiquam ſummam reddit'*, which he had before, and that is the Effect and Subſtance of the Matter, altho' it differs in Quality; ſo when the Rent is payable at 4 Days of the Year, *(g)* and now it is reſerved at two Days only, it is not material. For the Words are, *reddendo verum & antiquum redditum*, and doth not ſay, *ad uſualia feſta*, &c. ſo if he reſerves the true and ancient Rent it is ſufficient. And it was ſaid, if Ten't in Tail be of two Farms, *(h)* one, which hath been always let for 20 *l.* Rent, and the other for 10 *l.* Rent, and he makes a Leaſe of both for 21 Years, rendering 30 *l.* Rent intirely out of both, it is good, and yet it is not the accuſtomable Rent which hath been paid, &c. for now it is one intire Rent, where it was ſeveral before, and now this intire Rent iſſues out of both, and each of them charged with the whole Rent, where each of them was ſeverally charged before; but intire and ſeveral are but Qualities of the Rent; but in Subſtance the accuſtomable Rent is reſerved, for they both amounted to 30 *l.* and that is reſerved. So if Tenant in Tail be ſeiſed of three Acres of Land, each of equal yearly Value, and all have been demiſed for 3 *s. per annum*, in ſuch Caſe he may leaſe one of them for 12 *d. per annum*, or two of them for two Shillings *per annum*, and ſo *(i) pro rata*: And yet in theſe two Caſes it is not the cuſtomable

Noy 110.

(b) Poſtea 5. b.

(c) Bridg. 20. Poſt. a 5. b.

(d) Co. Lit. 44. b.

(e) 10 Co. 124. b. 2 Bulſt. 53, 86. 1 Leon. 160.

(f) 11 Co. 34. b. Co. Lit. 54. b. 283. b. Wing. Max. 19. Hawk. Max. 425. 3 Bulſtr. 65.

(g) 6 Co. 38. a. Poſt. 4. Co. Lit. 44. b. Ley 72. 1 r. Jac. 76, 77. 2 Rol. Rep. 407. Cr. Car. 17. Degge 111.

(h) Poſtea 5. b.

(i) Poſtea 5. b. Co. Lit. 44. b.

cuſtomable Rent which hath been paid. So if two (a) Coparceners be ſeiſed of certain Land in Tail, which hath been let for 10*l.* Rent, one of them may let his Part or Moiety for 5*l.* In all which Caſes the Rent reſerved, altho' it differs in Form or Quality, yet in Subſtance it is *verus & antiquus redditus* within the ſaid Act of 27 *H.* 8. It was further ſaid, That if a Manor has been always let for 10*l.* Rent, and afterwards a Tenancy * eſcheats, yet it may be let for 10*l.* and yet it may be argued that this is not *verus & antiquus redditus*, for no Rent was ever reſerved before out of Land eſcheated, and by Conſequence the Rent reſerved cannot be called *verus & antiquus redditus*: But that would be too nice and ſubtile an Interpretation; for by the ſame Reaſon, if a Copyhold of Inheritance is forfeited, it may be ſaid, that becauſe the Rent of the Copyhold was demiſed and not the Land, it ſhould impeach the Leaſe, which would be too hard a Conſtruction, tending to avoid many Leaſes of poor Men, which would be inconvenient: So in the Caſe at Bar, altho' the Acre of (b) Waſte was never demiſed before, yet inaſmuch as the Value thereof, and more is reſerved, the Purview and Intent of the Act is well obſerved.

(a) Co. Lit. 44. b. Poſt. 5. b.

* Poſt. 6. a.

(b) Poſtea 5. b. Moor 199.

4. It was argued, and ſtrongly urged, that if the ſaid Render as to the ſaid Acre of Waſte, the Services, Heriots, Leets, &c. (which were never demiſed before the ſaid Grant and Render) ſhould be void by the ſaid Act, that then it was conſequently good for the Demeſnes which had been demiſed; for then all the Rent reſerved ſhould iſſue out of the Demeſnes.

5. If it ſhould not be void as to ſuch Things which were not demiſed before, yet after the Death of him who made the Grant and Render, there ſhould be an Apportionment of the Rent for them; and then foraſmuch as the whole Rent and more is reſerved for the Demeſnes, (altho' the Rents of the Freeholders and Copyholders and the Acre of Waſte be deducted) & *verus & antiquus Redditus*, and more beſides them ſhould remain for the Demeſnes, for this Cauſe it was urged, that the ſaid Render ſhould be good for the Demeſnes; & *id* (c) *certum eſt, quod certi reddi poteſt*: And in this Caſe, after many Arguments, and great Deliberation and Conſideration ſix Points were reſolved.

(c) Co. Lit. 45. a. 96. a. 142. a. 9 Co. 30. a 47. a. 4 Co. 66. b. Lane 51. Hetley 98. Poſt. 6. a. 2 Brown. 336.

1. That altho' it be provided by the ſaid Act, that all Eſtates, &c. reſtrained by the ſaid Act, &c. ſhould be void, yet it is not by Conſtruction of Law void as to the Tenant in Tail himſelf, (d) but ſhould be avoided by the Iſſues in Tail; for the Intent of the Act was to provide, that the Donees or any of them, *non facerent aliquid ad nocumentum, vel exhereditation' hæred' eorum*, and not to make void the Eſtate which the Donee himſelf made againſt himſelf; and all Acts of Parliament, as well private as general, ſhall be taken by a rea-

(d) 3 Co. 59. b. 60. a. Mo. 199. 10 Co. 59. a. b. 60. b. 61. b. Co. Lit. 45. a. Cr. El. 207. 1 And. 244. Carter 13, 16. 1 Rol. Rep. 152, 159, 169. 1 Mod. Rep 205, 1 Vent. 247.

a reasonable Construction to be collected out of the Words of the Acts themselves, according to the true Intent and Meaning of the Makers of the Act. *Vide (a)* 14 *E.* 4. 1. *a.* & *(b)* 43 *Ass. p.* 29.

(a) 4 Co. 76. b. Br. Parliament 61.
(b) 4 Co. 76. b. Br. Parliament 35.

2. It was resolved, That in respect of the said Acre of Waste, which was never (c) demised before, the Rent which is entirely reserved out of the Whole, cannot be called *verus & antiquus redditus*: For how can it be called *verus & antiquus redditus*, when it issues out of a Thing, which was never charged with any Rent, by any Reservation before?

(c) 3 Bulstr. 291. Moor 198, 199, 494. Cro Car. 50. Co. Lit. 44. b.

3. By the Grant and Render of the Manor, he to whom the Render is made hath an Interest and a Term in the Lands held by Copy, and when any of the Copyholders die, or it be forfeited, he may enter and enjoy the Land himself if he will; and the Rent reserved doth issue out of the same Lands held by Copy, which Lands were never charged with any Farm-Rent before, but always have been demised by Copy according to the Custom of the Manor: And when the Demesnes of the said Manor have been only demised for Rent, in the Case at Bar, the whole Manor cannot be demised within the said Act; also the Estates which the Ten't in Tail shall make by the said Act of 27. are distinguished by the Act, *scil.* Estate for Life, for Years, and at Will, according to the Custom of the Manor; but by this Grant and Render all are put in Hotchpot and jumbled together, as Sir *Tho. Gawdy* said, whereas the Copyholds ought to have been granted by Copy, accord. to the Custom of the Manor, and not by Fine or Deed.

(d) Co. Lit. 44. b. 6 Co. 37. b. 38. a. Antea 4. b. Ley 72. 2 Rol. Rep. 407. Cr. Jac. 76, 77. Cr. Car. 17. Degge 111.

4. The Reservation of the Rent at (d) two Days where the Rent was reserved and payable at four Days before, makes the Grant and Render void, because it is *ad nocumentum* of the Heirs in Tail, which is restrained by the Act; for it is more beneficial for them to have it paid at four Feasts than at two. And all beneficial Qualities of the Rent ought to be reserved and observed.

(e) Antea 4. b. (f) Cr. Car. 21, 22. Antea 4. b.

5. As to the Cases which have been put, of the Reservation of Silver (e) in lieu of Gold, or of joining (f) two several Farms in one Demise, with Reservation of one and the same Rent, or to let Parcel of a Farm rendring Rent *pro rata*, all these were denied by the whole Court; but the Case of Reservation of eight Bushels of Wheat in (g) lieu of a Quarter is all one in Quality, Value, and Nature, and varies only in Words. But *Wray* Ch. Just. said, that he did agree to the Case of (h) two Coparceners, that one might let her Moiety, yielding the Moiety of the accustomable Rent; for in as much as they are in by Act of Law, and of God, it would be hard that the Frowardness of her Coparcener should prejudice her of the Benefit of a Fine which she might have by making of a Lease of her Moiety: And so a Difference between that Case and the Case of the Lease of Part with Reservation of Rent (i) *pro rata*, which is her own Act, and which Rent for Parcel is not the accustomable

(g) Bridg. 20. Antea 4. b.
(h) Antea 5. a. Co. Lit. 44. b.
(i) Co. Lit. 44. b. Antea 4. b.

ſtomable Rent which hath been paid. So and for the ſame Cauſe, when two diſtinct Farms are joined (*a*) together, the whole Rent which is reſerved out of both, is a new Rent, and not the accuſtomed Rent. And as to the Caſe of (*b*) Eſcheat of a Tenancy it was agreed for good Law. For the Act of Law, or of God will not prejudice any one. But if the Leſſor had purchaſed the Tenancy, it would be otherwiſe, for that which is purchaſed is not Parcel of the Manor, becauſe he acquires it by his own Act.

6. It was reſolved, That no Apportionment (if any ſhould be) in this Caſe would make the Render good; for firſt, no Apportionment could be made in this Caſe, for as much as there be Copyholders for Mens Lives, which depend on the Providence of God, Heriots, Profits of Court, which are Accidentals, and other Caſualties, which could not be reduced to a (*c*) yearly Value, as it is ſaid in *Butler*'s and *Baker*'s Caſe; for this Cauſe no Apportionment could be made, for Apportionment ought to be of a Certainty. And where it was ſaid, *Quod id* (*d*) *cert' eſt, quod cert' reddi poteſt*; It was anſwered, *Quod* **id incert' eſt, quod cert' reddi nullo modo poteſt.* 2 *Wray* Ch. Juſt. ſaid, That altho' there ſhould or might be an Apportionment after the Death of Tenant in Tail, that would not ſerve to make the Grant and Render good, for if *verus & antiquus reddit'* be not reſerved Yearly, during the Term (as by Conſtruction of Law is implied) the Power which the Tenant in Tail hath is not purſued. For it is not ſufficient, *Quod verus & antiquus reddit'* be reſerved to the Heirs in Tail, but it ought alſo to be reſerved to the Tenant in Tail himſelf; and therefore if he reſerves a leſs Rent to himſelf during his Life, and after his Death, the true and antient Rent, the Leaſe is not good: And altho' the Stat. was made principally, as hath been ſaid, for the Benefit of the Heirs in Tail, &c. yet the Reſervat. ought in Conſtruction in Law to be of the true and antient Rent during the whole Term. And therefore if the true and antient Rent be not reſerved during the Life of the Tenant in Tail who made the Grant and Renter, (as in Truth it was not in the Caſe at Bar) no Apportionment after his Death will make the Demiſe good. And for as much as the Land it ſelf held by Copy was demiſed, it would appear on Apportionment (if any ſhould be) that the antient Rent would not remain for the Demeſnes.

And in the Argument of this Caſe, the Difference of Penning of divers Stat. concerning Leaſes was obſerved. The Stat. of 32 (*e*) *H.* 8. *c.* 28. that appoints the Demiſe to begin *from the Day of the Making*, &c. *not above the Number of* 21 *Years, or three Lives, and that there ſhall be reſerved Yearly during the ſame Leaſe*, &c. *ſo much Yearly Rent, for Farm, or more, as hath been moſt accuſtomably paid*, &c. *within* 20 *Yerrs before ſuch Leaſe made*; ſo that a Leaſe for

(*a*) 1 Co. 139. a. Cr. Car. 21, 22.
(*b*) Antea 5. a.
(*c*) 3 Co. 32. b. 33. a.
(*d*) Co. Lit. 45. b. 96. a. 142. a. 9 Co. 30. a. 47. a. 4 Co. 66. b. Antea 5. a. Lane 51. Herl. 98. 2 Brownl. 336. * 1 Co. 155. a.
(*e*) 3 Co. 50. b. 5 Co. 2. b. 6 Co. 37. a. 7 Co. 7. b. 8 Co. 34. a. 72. a. 9 Co. 140. b. 10 Co. 60. a. Co. Lit. 44. a. 333. a. Plow. 112. b. Raſt. Leaſes 2. Dyer 72. pl. 3. 162. pl. 48, 191. pl. 22, 246. pl. 69, 271. pl. 28. 357. pl. 43, 363. pl. 26. Sav. 85. pl. 165. Cr. Jac. 173. Cr. El. 350, 602. Cr. Car. 22, 44, 435. 1 Rol. Rep. 159, 163, 230. 2 Rol. Rep. 169, 311, 332, 405, 410, 491, 499. Hob. 204. Latch. 45. Bridg. 28. Moor 58, 759, 783. 1 Leon. 59, 148. 3 Leon. 132, 156. 1 Jones 60. 2 Inſt. 342, 681. Godb. 102. pl. 119. 3 Keb. 381.

for a lesser Term or a greater Rent is within the Letter of the said Statute: the Words of the Statute of 1 *Eliz.* of Leases made by Bishops are, *Other than for the Term of 21 Years, or three Lives,* (without saying, *or under*) *from such Time as any such Grant or Assurance shall begin, whereupon the old accustomed yearly Rent, or more* (without Limitation of any Time) *shall be reserved,* &c. And yet a Lease for lesser Time is good, and the Rent ought to be reserved during the whole Term. The Statute of *(a)* 13 *Eliz. c.* 10. *other than for the Term of* 21 *Years, or three Lives* (without saying, *or under*) *from the Time as any such Lease or Grant shall be made, whereupon the accustomed yearly Rent, or more, shall be reserved,* &c. And many other Matters were moved by the Counsel on both Sides at the Bar in this Case, which I purposely omit because the Court gave no Resolution of them.

(a) Co. Lit. 44. b. 6 Co. 37. b. 38. a.

And take great Care (good Reader) if you contract for any Lease, on any of the said, or any other Statutes, or with any Person who hath Power to make Leases, by any of the Provisoes newly invented and put into Indentures, you take good Advice of Counsel on the Sight and good Consideration of them in making of your Lease; and my hope is, that the Report of these Cases concerning Leases will bring to their Memory some Things tending to the repose and quiet of poor Farmers.

Mich. 31 & 32 Eliz.

In the King's Bench, in a Writ of Error.

Justice WINDHAM's *Case.*

IN Trespass between *Francis Windham* one of the Justices of the *Common Pleas* Plaintiff, and *John Debney* and others Defendants, in the *Common Pleas* for Trespass done in Meadow called *Sextens* Meadow in *Trowse* in the County of *Norfolk*, the Case was such; The Dean and Chapter of the holy and individed Trinity of *Norwich* were seised of the said Meadow called *Sextens* Meadow, and of another Meadow in the said Town called *Cheese* Meadow; and by Indenture under their common Seal, 37 *H.* 8. demised Cheese Meadow to *Howlins* for 40 Years: And afterwards 4 & 5 *Phil. & Mary*, by Indenture under their common Seal, demised *Sextens* Meadow to the said *Howlins* and *Debney* for 21 Years. And afterwards 12 *Eliz.* the said Dean and Chapter demised to *Nicholas Manne* both the Meadows with a several *Habendum*, *scil.* to have and to hold *Cheese* Meadow for 40 Years after the End of the first Lease thereof made; and to have and to hold *Sextens* Meadow for 40 Years after the first Lease thereof made, with several Reservations of Rents. The said *Manne* assigned his Interest to *John Hoe*, who 15 *Eliz.* surrendred and took a new Lease by Indenture of the said Dean and Chapter under their common Seal (in which the first Leases were recited) of both the Meadows, *Habendum sibi ab & post determinationem præd. separalium dimissionum*, *videlicet*, *præd. dimission. præd.* Rob. Howlyns *in forma præd. fact'*, *& præd. dimission. præf.* Rob. Howlyns & J. Debney, *&c. in forma præd. fact'*, *pro esset per surs. reddit'*, *determinat'*, *&c. usq; ad fin' & terminum*

Moor 191. Cr. El. 199. 2 Leon. 106. Lit. Rep. 364.

min' 40 annor' ex tunc proxim. ſequen', exiſten' verum numerum annor' mentionat. in dict. ſurſum reddit. Indentur. dict. Nicholao Manne made: *Reddendo*, &c. the antient Rent ſeverally for the ſaid Meadows; ſo that in Effect the Caſe is; A Man makes a Leaſe of *Sextens* Meadow to *A.* for ten Years, and of *Cheeſe* Meadow to *B.* for twenty Years; and afterwards by Indenture reciting the ſaid two Leaſes, makes a Leaſe to another of both for forty Years, to begin after the End or Determination of the ſaid ſeveral Leaſes made to *A.* and *B.* And afterwards the former Leaſe of *Sextens* Meadow ends, and the Leaſe of *Cheeſe* Meadow continues; and when the laſt Leaſe as to *Sextens* Meadow now in queſtion ſhould begin was the Queſtion; for if it ſhould not begin till the Leaſe of *Cheeſe* Meadow be ended, then the Pl. had entred before his Time, for the former Leaſe of *Cheeſe* Meadow hath yet Continuance. But if the ſaid *Habendum* in the later Leaſe ſhould be taken * *reſpective* or *diſtributive*, (a) *Reddendo ſingula ſingulis*, ſo that when the Leaſe in *Sextens* Meadow determines, the new Term for 40 Years therein ſhould begin, then Judgment ought to be given for the Pl. And after many Arguments at Bar and Bench in the *Common Pleas*, it was reſolved and adjudged, That the *Habend'* in the later Leaſe ſhould be taken *reſpective*, that is to ſay, the Leaſe of *Sextens* Meadow to *John Hoe* for 40 Years ſhould begin (b) preſently after the End of the firſt Leaſe thereof made. For every Deed ſhall be taken more (c) ſtrong againſt the Grantor, and more beneficially for the Grantee, and it is more ſtrong againſt the Leſſor, and more beneficial for the Leſſee to have the Leaſe of *Sextens* Meadow to begin preſently after the Expiration of the firſt Leaſe made thereof, than to tarry till the Leaſe of *Cheeſe* Meadow be ended. As in (d) 9 *E.* 4. 42. *b.* & 19 *H.* 6. 4. *a.* If I releaſe unto you all Actions which I have againſt you and another, in this Caſe notwithſtanding the joint Words, all Actions which I have againſt you alone are releaſed, for it ſhall be moſt beneficially for him to whom the Releaſe is made, and moſt ſtrongly againſt him who makes it; and the joint Words of the Parties ſhall be taken *reſpective* and ſeverally.

1. Sometimes in reſpect of the ſeveral Intereſts of the Grantors; as if two (e) Tenants in common, or ſeveral Tenants join in a Grant of a Rent-Charge, yet in Law this Grant ſhall be ſeveral, although the Words are joint, as Sir *Robert Catlyn* Chief Juſtice held in *Browning*'s Caſe in *Plow. Commentaries.*

2. Sometimes in reſpect of the (f) ſeveral Intereſts of the Grantees, &c. as 19 *H.* 6. 63, 64. a Warranty made to two of certain Lands ſhall enure as ſeveral Warranties in reſpect that they are ſeverally ſeiſed, the one of

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1 Mod. Rep. 33.
(a) Moor 291. Cr. Jac. 259. 9 Co. 27. b. 10 Co. 85. b. 2 Rol. Rep. 411, 412. Cr. El. 471. Palm. 390. 1 Sand. 184.
(b) Jenk. Cent. 272. Cr. Jac. 35, 259, 656. 10 Co. 85. b. Yelv. 183. 1 Bulſtr. 42. 1 Brownl. 147. 3 Keb. 85. 1 Sand. 184. Moor 191. 2 Leon. 106. Cr. El. 199. 3 Keb. 85.
(c) Jenk. Cent. 272. Lit. Rep. 371. Co. Lit. 42. a. 99. a. 183. a. 197. a. 6 Co. 36. a. Plowd. 103. b. 287. b. Winch. 96. 7 Co. 23. a. 8 Co. 145. a.
(d) Fitz. Releaſe 14. 4 Co. 50. a. Br. Releaſe 29.
(e) Plowd. 140. b. 161. b. 171. a. 289. a. b. Perk. ſect. 106, 107. Hetly 9. Yelv. 189. Co. Lit. 197. a. 267. b.
(f) Poſtea 19. a.

art of the Lands, and the other of the Reſidue in Severalty, 6 *E.* 2. * *Covenant Br.* 49. A joint *(a)* Covenant taken everal in reſpect of the ſeveral Intereſts of the Covenantees. *ide* 16 *Eliz. Dier* 337, 338. between Sir *Anthony* (*b*) *Cook* nd *Wotton*, a good Caſe.

3. Sometimes in reſpect that the Grant cannot take Effect, ut at ſeveral Times, as 24 *E.* 3. 29. *a.* a Rem'r limited to he right Heirs of *J. S.* (*c*) and *J. N.* (*J. S.* and *J. N.* being live) in which Caſe the Words are joint, and yet the Heirs hall take ſeverally; for they ſhall not join in Action.

4. Sometimes in reſpect of the Incapacity and Impoſſibility f the Grantees to take jointly, as a Leaſe made to an Abbot nd (*d*) ſecular Man, or a Gift to two Men, or to two Wonen, and to the Heirs of their two Bodies begotten, the Inhetance is (*e*) ſeveral, 7 *H.* 4. 17. *vide Chapman*'s Caſe, *Pl. Com.*

5. Sometimes in reſpect of the Cauſe of the Grant, or *ratione ſubjectæ materiæ*, as 15 *H.* 7. 14. *a.* One (*f*) Coparcener rants a Rent to two other Coparceners for Owelty of Partion, altho' the Words are joint, yet the Cauſe of the Grant hall be reſpected, and the Rent ſhall be of the Quality of he Land, and therefore they ſhall have the Rent in Degree nd Quality of Coparcenary, and not jointly. And *Knivet* h. Juſt. and Chancellor ſaid in 38 *E.* 3. 26. that if two Coarceners make a Feoffment in Fee, rendring Rent to them nd their Heirs, the Heirs of both ſhall inherit, becauſe their ight in the Land was ſeveral, (*g*) 22 *E.* 4. 25. *b.* & (*h*) *R.* 3. 18. *b.* A joint Submiſſion to Arbitrament taken ſeverlly in Reſpect of the ſeveral Cauſes, &c.

6. Sometimes *Ne res deſtruatur, & ut evitetur abſurd'*, as 6 *H.* 7. 7. *b. in* (*i*) *Ceſſavit*, where the Tenure is alledged by omage, Fealty, and Rent, and the Demandant counts, that *faciendo ſervitia præd' ceſſavit*, ſhall be by Conſtruction ken to ſuch Services only, of which a Man may ceaſe, (*k*) *E.* 3. 1. *b.* & 2. *a.* The Prior of *Tikeford*'s Caſe in a *Scire fas* againſt the Succeſſor of the Prior on a Judgm. given in a rit of Annuity for the Arrearages in the Time of the Preceſſor, and of the Succeſſor, and the Writ was that the Preceſſor and Succeſſor *nondum reddiderunt*: To which Exption was taken that the Predeceſſor was ſuppoſed not to ender that which the Succeſſor ought, & *non allocatur*; for *ddendo ſingula ſingulis* by reaſonable Conſtruction, the Words y well ſtand together. *Vide* 21 *E.* 3. 48. *a.* in a *Per quæ ſervia, F. N. B.* 14. *in Monſtraverunt*: And the Reaſon of all eſe Caſes is, either *quod* (*l*) *res non deſtruatur*, or that the ant ſhall be taken more ſtrong againſt the Grantor, and ll take Effect as near as may be according to the Intent the Parties. And ſuch Conſtruction concurs with two of e ſaid Reaſons in the principal Caſe. 1. It ſhall be tan more ſtrongly againſt the Leſſor. 2. This Conſtruction

* Poſtea 19. a.
(*a*) Poſtea 19. a.
(*b*) 1 Anderſ. 53, 54. N. Benl. 228, 229. Dyer 337, 338. pl. 39.
Poſtea 19. a.
(*c*) Co. Lit. 188. a. 2 Roll. 89. 13 Co. 57. Fitz. Joinder in action 10. 30 Aſſ. pl. 47.
(*d*) Perk. ſect. 106. Lit. ſect. 296, 297. Co. Lit. 190. a.
(*e*) Co. Lit. 183. a. b. 184. a. 8 Co. 87. a. 7 H. 4. 16. b. 17. a. Lit. ſect. 283, 284. 1 Co. 84. b. 2 Anderſon 12, 138. Br. Jointenants 40.
(*f*) Hob. 172. Br. Rent 8. Br. Jointenants 20. 3 Keb. 215. Co. Lit. 169. b. Dy. 153. pl. 14. 29 Aſſ. pl. 23. Fitz. Partition 12. Plow. 134. b.
(*g*) Br. Condition 182. Br. Arbitrement 41. 8 Co. 98. a. b.
(*h*) Bridg. 91. Plowd. 289. b. Br. Arbitrement 44.
(*i*) Fitz. Ceſſavit 5. Br. Ceſſavit 23. Br. faux latin 76. Doctrin. placit. 97, 289, 290.
(*k*) Fitz. Brief 663.
(*l*) 1 Co. 76. a. 2 Co. 72. b. 8 Co. 95. b. 3 Keb. 288. 2 Jones 69. 5 Co. 55. b. 1 Mod. Rep. 109.

ction will concur with the Intent and Meaning of the Parties, for after the *Habendum* and the Number of the Years these Words are added, *existen' verum numerum annor' in dict' sursum reddit' Indent' mentionat'*, in which Indenture the *Habendum* was several, so that the Intent of the Parties was to have several Beginnings in this new Lease, &c. and the Lessor and Lessee never imagined but that the Leases should begin severally, and not that the Lessee should wait for *Sextens* Meadow, until the Lease of *Cheese* Meadow, which is another distinct Lease, and a distinct Thing, should end. And so it was adjudged, and the Plaintiff had Execution. Upon which Judgment a Writ of Error was brought, and after many Arguments it was resolved by Sir *Christoph. Wray*, Sir *Thomas Gawdy*, and the whole Court of *King's Bench*, That the Lease to *Hoe* should have several Beginnings. And so this Case was resolved by both Courts. And afterwards the same Term in a Case between *Pollard* and *Alcocke* in the Court of *Wards*, *Wray* Chief Justice clearly held: That if a Man be seised of three Acres of Land in Fee, and makes a Lease of one other to *A.* for Life, of another Acre to *B.* for Life, and of the other to *C.* in Tail, and afterwards by Deed (reciting the said Estates) covenants with his Brother, That after all the said Estates ended and determined, he and his Heirs would stand seised of the said three Acres to the Use of his Brother in Tail, *&c.* That in this Case presently by the Death of *B.* the Brother should have the Acre leased to *B.* and should not tarry till all the Estates, *scil.* the other Estate for Life, and the Estate-tail be ended: But *reddendo singula singulis*, by the Covenant the Estate in the several Acres vest presently in the Brother and should take Effect in Possession, as the several Estates in Possession end or determine, which was granted by the whole Court. And in the Case of *Pollard*, *Wray* cited and relied on the said Case of Just. *Windham*. And afterwards the Plaintiffs in the Writ of Error perceiving the Opinion of the Court, did not proceed in their Writ of Error.

2 Leon. 106. Cr. El. 199. Jenk. Cent. 272. Lit. Rep. 220. 2 Bulstr. 132.

Trin. 34 Eliz.

In the King's Bench.

BRUDNEL's *Caſe.*

Thomas Brudnel Adminiſtrator of *Anthony Rone*, brought an Action of Debt on Bond of 200*l.* againſt *Thomas Skidmore*, and had Judgment to recover in the *Common Pleas*, and died; *Robert Brudnel* and *John Brudnel* Executors of the ſaid *Thomas Brudnel* ſued a *Scire facias* on the ſaid Judgment, and Proceſs continued until the ſaid *Thomas Skidmore* was outlawed; and now the ſaid *Thomas Skidmore* brought a Writ of Error. And note, it appeared in the Record certified, that the ſaid *Thomas Brudnel* was Adminiſtrator to the ſaid *Anthony*, during the Minority of *Edward*, *Jeremy*, *Humphrey* and *Anne*, the Children of the ſaid *Anthony*; and he averred in his Declaration, that the ſaid *Edward*, *Humphrey* and *Anne* were alive; and within Age, and did not (*a*) aver that the ſaid *Jeremy* was alive, or within Age; and the Plaintiff's Counſel aſſigned for Error, that when Adminiſtration is committed to one during the (*b*) Minority of four, if one of them dies, or comes of full Age, the whole Authority ceaſes, for a Difference was taken between a Limitation annexed to an Eſtate or Intereſt, and a collateral and bare Limitation not coupled or conjoined with an Eſtate or Intereſt, of which there can be no Survivor; as if a Man makes a Leaſe to (*c*) during their Lives, there if one dies his Eſtate ſhall ſurvive: But if a Leaſe be made to *A.* during the Life of *B.* and *C.* without ſaying, and during the Life of the (*d*) Survivor of them, there if one of them dies, the Eſtate (as it is ſaid) was determined. But it was anſwered and reſolved by Sir *John Poph.* Chief Juſtice, and the whole Court, that the ſame Caſe put by the Plaintiff's Counſel, if one of the *Cuy que vies* dies, the Eſtate is not determined, but *A.* ſhould have the Land during the Life of the Survivor of them: and ſo was it reſolved by all the Juſtices at *Mich.* Term held

(*a*) Cr. Car. 50.

(*b*) 1 Brown. 46. 47. 2 Brown. 83. 1 Leon. 74.

(*c*) 1 Mod. Rep. 187.

(*d*) 2 Brown. 292. 11 Co. 3. b. 13 Co. 66.

held at St. *Albans* 5 & 6 *Eliz.* for *A.* had an Eſtate of Freehold by Way of Limitation of an Eſtate during the Lives of two Men, and by Conſtruction of Law during the Life of the Survivor of them: As if a Man makes a Leaſe of Land to two Men during their Lives, and they aſſign their Eſtate over, now the Aſſignee hath an Eſtate for the Life of the two Men, and if one dies, he ſhall have the Land during the Life of the Survivor of them. And two Differences were taken and agreed in this Caſe.

1. Between a Limitation, as the Caſe before, and a Condition: For if a Man leaſes Land for 100 Years if *A.* and *B.* ſhall ſo long live, in that Caſe if one of them dies, the Leaſe is (*a*) ended, for the Leaſe was conditional, and not determinable by Limitation of Eſtate; and the Life of a Man is collateral, as to the Leaſe which is but a Chattel.

The ſecond Difference was between a Limitation of an Eſtate of Freehold during Lives, which is the uſual and ordinary Limitation of a Freehold and collateral Determinations, as during the Time that *C.* and *D.* ſhall be of the *Inner Temple*, or during the Time that *C.* and *D.* ſhall be dwelling in *Norfolk*, or ſhall be Juſtices of Peace, or the like; for in theſe Caſes the Failure of the one ſhall determine the Eſtate: But the ſaid Point moved for an Error in the Caſe at Bar was not expreſly reſolved, becauſe another Error was moved for which without Queſtion the Judgment was reverſed, and that was, that when the Adminiſtrator had Judgment and died, his Executors could not ſue Execution of the ſaid Judgment; for none ſhall have Execution of that Judgment, but he who ſhall be ſubject to the Payment of the Debts of the firſt Inteſtate, and that the ſaid Executors are not, *vide* 26 *H.* 8. 7. And it is adjudged in 28 *H.* 8. reported by Serjeant *Bendloes*, That the Adminiſtrator of an Executor ſhall not have Execution of a Judgment given for the Executors. (*b*) And the Opinion of the Court was, that the ſaid Outlawry on this Judgment was erroneous; and for this Cauſe it was reverſed.

(*a*) Raym. 126. 1 Rol. Rep. 197, 309, 310. 3 Bulſtr. 31, 131. Moor 400, 876. Cr. Car. 378. Cr. El. 414. Co. Lit. 219. b. 1 Rol. 832. 11 Co. 3 b. 1 And. 161, 162. Owen 52. Goldsb. 71, 72. 1 And. 151. pl. 199. 1 Mod. Rep. 187. Cr. Jac. 377, 378. 1 Leon 74, 103. 1 Brownl. 30, 39, 180, 181. 1 Vent. 163. Palm. 23. 2 Vent. 74, 108.

(*b*) 1 Co. 96. a. 1 Rol. 890, 907. Went. 148, 149. Yelv. 33, 83. Moor 4, 139, 680. 1 Jones 214, 248, 385, 386. O. Benl. 2. pl. 5. N. Benl. 18. pl. 24. Cr. Jac. 4, 394, 459. Cr. Car. 167, 227, 451, 459. 2 Sand. 149. 1 Sid. 29, 317. March. 9. 1 And. 23, 24. Finch 4. b. 5. a. 17 Car. 2. c. 8. 30 Car. 2 c. 6. Swinb. 323. 1 Cr. El. 435. Dyer 47. pl. 12. 112. pl. 51. 2 Brown. 144. Noy 81, 82. Latch 140. Palm. 443. 2 Sid. 122.

Mich.

Mich. 36 & 37 Eliz. Rot. 1634.

In the Common Pleas.

HENSTEAD's *Case.*

THE Case was such; A Woman Tenant for Life of a House and certain Land in *Shoram* in *Kent* made a Lease at Will rendering Rent, and afterwards took Husband; and she and her Husband brought an Action of Debt for the Arrearages after the Marriage; and if the Lease at Will were determined by the Intermarriage or not was the Question. And it was agreed by the whole Court, That the Will was not determined (*a*) by the Intermarriage; for altho' the Woman had by marrying submitted her self to the Will of her Husband as her Head; yet forasmuch as it might be prejudicial to the Husband to have the Lease determined (for then he would lose the Rent to be paid at the next Day after the Marriage, and it cou'd not be in any Manner prejudicial to the Wife, if the Lease continue, but rather to her Benefit. And generally it might be great Prejudice to all Husbands who intermarry with Women who have Tenants at Will for the Losing of their Rents.) For these Causes it was resolved, that without express Matter done by the Husband after the Marriage to determine the Will, it is not determined. The same Law, if a Lease be made to a Woman (*b*) at Will, and she marries, the Will continues notwithstanding the Marriage.

(*a*) Kelw. 162. b. 163. a. Herl. 72. 1 Rol. 861. Cr. Car. 304. Co. Lit. 55. b.

(*b*) Co. Lit. 55. b. 1 Rol. 861. Cr. Car. 304.

So if a Lease at Will be made to (*c*) three rendering Rent, and one dies, it is no Determination of the Will, and although nothing can survive, yet because every Jointenant is possessed *per my & per tout*, they shall be charged with the whole Rent. And so the *Quære* in 10 *El. Dier* (*d*) 269. *b.* well resolved: But in the Case at Bar after the Marriage, the Woman her self could not countermand or determine the Lease at Will, no more than where (*e*) she and her Husband make a Lease at Will rendering Rent during the Coverture;

(*c*) Dyer 269. pl. 20.

(*d*) Dyer 269. pl. 20.

(*e*) 1 Rol. 861. Co. Lit. 55. b.

verture; or if a Lease be made to them at Will: For she hath submitted her self, and all her Will to her Husband; and so a Feme Covert may have a Tenant at Will; and be Tenant at Will, and yet she her self cannot countermand it, because she by her Intermarriage hath put her countermanding Power in this Case (which doth not concern Freehold or Inheritance) into her Husband's Mouth.

(a) 1 Rol. 861. Co. Lit. 55. b.

Also if the Husband (*a*) and Wife lease Land at Will rendering Rent, and the Husband dies, it is no Countermand of the Will, but the Lease continues. So it was said, if two (*b*) Jointenants make a Lease at Will rendering Rent, and one dies, all survives to the other, and if the Lessee continues his Possession, the Survivor shall have an Action for the whole Rent for the Privity, and it shall not be a Countermand for one Moiety for the Mischief which might ensue to Lessors, and the rather because no Mischief or Prejudice can come to the Lessees in such Case.

(b) 1 Rol. 861. Co. Lit. 55. b.

Mich.

Mich. 39 & 40 Eliz. *which began Pasch.* 38 Eliz. *in the Common Pleas.*

IVE's *Case.*

IVE brought an Action of Waſt againſt *Sammes*, and counted of a Leaſe made to the Defendant of the Manor of *Tottenham* in the County of *Eſſex* for 30 Years: The Defendant pleaded, *non dimiſit*; and by ſpecial Verdict it was found, That the Leſſor made a Leaſe for 30 Years of the ſaid Manor, except all Woods and Underwoods growing or being on the Manor; and afterwards made a ſecond Leaſe to the ſame Leſſee of all the Woods and Underwoods growing or being on the ſaid Manor for the Term of 62 Years without Impeachment of Waſt, and afterwards made a third Leaſe of the ſaid Manor to the ſaid Leſſee for 30 Years, without Exception to begin at a Day to come, *ſcil.* from the Expiration of the ſaid firſt Leaſe for 30 Years; and after the Term of 30 Years expired, the Leſſee cut Trees; *Ive* in Reverſion brought an Action of Waſt, and it was adjudged for the Plaintiff. And in this Caſe three Points were reſolved.

1. That by the (*a*) Exception of the Woods and Underwoods growing or being on the Manor, the Soil itſelf is excepted (*b*), 14 *H.* 8. 1. *a. b. acc'*, and by Name of Wood may be demanded and recovered, and that theſe Words (growing or being) are Words of Abundance, for without them the Law will imply as much, & (*c*) *expreſſio eorum quæ tacite inſunt nihil operatur*, for by the Leaſe of the Wood and Underwood on the Manor, is implied that they are growing, and therefore to demiſe all Woods on the Manor, and all Woods growing on the Manor is all one. And ſo it was alſo adjudged, *Trin.* 7 *Eliz.* in the *King's Bench*, as it was there ſaid. *Vide* 46 *E.* 3. 22. *b.* 28 *H.* 8. *Dier* (*d*) 19. 33 *H.* 8. *Br.* (*e*) *Reſervation* 39. 7 *E.* 6. *Dier* (*f*) 79, &c. and ſo a Queſtion in our Books well reſolved.

2 And. 51. Lib. 11. f. 52. a. Cr. El. 521, 522. (*a*) 3 Bulſt. 290. Dall. 11. pl. 11. Br. Except. 2. Br. Treſp. 167. Palm. 497. (*b*) Dall. 11. pl. 11. 3 Bulſt. 290. 2 Rol. 455. 11 Co. 49. b. 47. b. Cr. El. 522. 1 Rol. Rep. 95, 96, 98. Co. Lit. 4. b. 44 E. 3. 34. b. Cr. Jac. 487, 488, 524. Perk. ſect. 642, 643. Poph. 146. 2 Brown. 231. (*c*) 8 Co. 56. b. 145. a. 4 Co. 73. b. 11 Co. 60. a. 10 Co. 39. a. 2 Rol. Rep. 353. Latch. 25. Palm. 433, 437. Co. Lit. 191. a. 205. a. Wing. Max. 235. 2 Inſt. 365. Lit. Rep. 111. 2 Sand. 351. 2 Bulſt. 131. 1 Mod. Rep. 190. Hard. 92. 1 Rol. Rep. 310. Hob. 170. (*d*) Dyer 19. pl. 110, 111. 1 Leon. 49. (*f*) Dyer 79.

3 Bulſt. 290. Co. Lit. 4. b. (*e*) 11 Co. 47. b. 3 Bulſt. 290. pl. 48. 11 Co. 47. b. Co. Lit. 4. b. 3 Bulſt. 290.

2. Notwithſtanding the ſaid Exception, the Wood remains Parcel of the (*a*) Manor, and by Leaſe of the Manor ſhall paſs, becauſe the Freehold remains intire, and the Leſſor remains Tenant to every *Præcipe*, and there needs no Exception. *Vide Plow. Comm.* 103. *b.* (*b*) *Fulmerſton's* Caſe; otherwiſe of a Leaſe for Life with ſuch Exception, *cauſa patet.* And therefore it was reſolved, That by the Leaſe of the Manor, the Woods ſhall paſs. *Vide* (*c*) 38 *H.* 6. 33. *b.* The King ſeiſed of a Manor to which an Advowſon was appendant, leaſed the Manor, (without ſpeaking of the Advowſon appendant, whereby it did not paſs) for Life; and afterwards granted the Reverſion, *Habendum una cum Advocatione*, the Advowſon ſhall not paſs, for during the Life of the Leſſee it was not appendant: Whereupon it is to be obſerved, That if a Man grants an Advowſon appendant for Life, the Reverſion is appendant to the Manor: But when a Man leaſes the Manor for (*d*) Life, except the Advowſon, the Advowſon in Poſſeſſion cannot be appendant to the Reverſion of the Manor expectant on the Eſtate for Life; otherwiſe on an Eſtate for Years.

3. That by the Acceptance of a future Leaſe, to begin divers Years after, the ſaid Leaſe of the Wood for 62 Years was preſently (*e*) ſurrendered, becauſe the Leſſee by Acceptance thereof had affirmed the Leſſor to have Ability to make the new Leaſe, which he had not, if the firſt Leaſe ſhall ſtand: As if Leſſee for 20 Years takes a Leaſe for three Years, to begin 10 Years after; it is a preſent Surrender of the whole Term, for it cannot be a Surrender of the laſt 10 Years, and remain for the firſt 10 Years, and ſo to make a Fraction of the Term: Nor can he who hath a Leaſe for 20 Years ſurrender the laſt 10 Years by any expreſs Surrender ſaving to him the firſt 10 Years. *Vide* 14 *H.* 8. 15. 2 *Mar.* 112. 4 *Mar.* 141. 3 *Eliz.* 200. 10 *Eliz.* 272. 11 *Eliz.* 280. 35 *H.* 8. 57. 21 *H.* 7. 6. 31 *Aſſ. p.* 26, 32 *H.* 8. 46. 37 *H.* 6 17. 14 *H.* 7. 37. 21 *H.* 7. 12, 40. 13 *R.* 2. *Dower.* 40 *E.* 3. 24, 43. 41 *E.* 3. 13. 44 *E.* 3, 25, 26. 45 *E.* 3. 13.

(*a*) Co. Lit. 324. b.
(*b*) Plow. 103. b. 104.
(*c*) Co. Lit. 324. b. 325. a. Fitzgrant 15. Hutt. 89. Br. grant 60. Br. patent 29. Plowd. Comm. 152, b. 399. a. b. 2 Rol. 121. Plow. 103. b. 104. b. 11 Co. 47. b.
(*d*) Co. Lit. 324. b. 325. a. 1 Rol. 233. 11 Co. 50. a. Hutt. 88, 89. Dyer 57. b.
(*e*) Cr. El. 264, 522, 605, 873, 874. Co. Lit. 218 b. 338 a. 2 Rol. 496. 10 Co. 52, 53. a. 67. b. Poph 8, 9. 2 Leon. 188. 3 Leon. 247. 4 Leon. 30. Dal. 74. Mo. 196, 358, 636, 637. 2 And. 52, 192. Dyer 46. pl. 9. 57, 58. pl. 2, 3, 112. pl. 49, 140. pl 43, 177. pl. 35. 200. pl 62, 280. pl. 13, 349. pl. 15. Perk. ſect. 617. 14 H. 8. 13. a. Br. Leaſe 14. 2 Rol. Rep. 171. 406. Lit. Rep. 269, 273, 282. Lane 7. 6 Co. 69. b. 37 H. 8. 18. a. Plow. 107. b. 194. b. Br. Surrender 14, 35. 2 Co. 17. b. 7 Co. 38. a. Raym. 148. O Benl. 57. Kelw. 70. b. 21 H. 7. 5. a. b. Br. eſtoppel 210. 2 Sid. 138.

Trin.

Trin. 41 Elizab. *which began Hill.* 40 Eliz. Rot. 747.

In the Common Pleas.

SAUNDER's *Case.*

SAunders brought an Action of Waſt againſt *Marwood* Aſſignee of the Term in the Tenement for Waſt done in digging of Sea-coals; the Defendant pleaded in Bar, that the firſt Leſſee who opened the Mine, granted to him all his Intereſt in the Land *cum omnibus profic' (Except. & ſemper reſervatis ſibi & hared' ſuis tot' benefic' & profic' Miner' Anglice* the Coal-Mine *in præd' parcell' terr' ac omnibus arboribus maeremii;)* and averred, that the ſaid Mine at the Time of the Aſſignment, and yet, is open. Whereupon the Plaintiff demurred in Law. And on great Deliberation it was adjudged for the Plaintiff, and in this Caſe three Points were reſolved. 1 Brown. 241. Cr. El. 683.

1. If a Man hath Land in Part of which there is a Coal-Mine open, and he leaſes the Land to one for Life, or for Years, the Leſſee may (*a*) dig in it: For inaſmuch as the Mine is open at the Time, &c. and he leaſes all the Land, it ſhall be intended that his Intent is as general as his Leaſe is; *ſcil.* that he ſhall take the Profit of all the Land, and by Conſequence of the Mine in it. *Vide* (*b*) 17 *E.* 3. 7. *a b. John Hull's* Caſe *acc'*, and ſo the Doubt in *F. N. B.* 149. *C.* well explained. (*a*) Co. Lit. 54. b. (*b*) Fitz. Waſt 101. (*c*) 1 Sider. 152. 2 Rol. 816. Latch. 190. Co. Lit. 54 b. Hob. 234. (*d*) F. N. B. 149. c. Co. Lit. 54. b. Latch 190. Hob. 234. 2 Rol. 816. 2 Jones 72. Hutt. 19. 2 Bulſt. 252. 1 Vent. 45.

2. If the Mine were not (*c*) open, but included within the Bowels of the Earth at the Time of the Leaſe made, in ſuch Caſe by Leaſing of the Land, the Leſſee cannot make new Mines, for that ſhall be Waſt. *F. N. B.* 59. & 22 *H.* 6. 18. *b. acc'.* (*e*) Poſt. 47. 2. Hob. 234. 2 Bulſtr. 252.

3. If a Man hath Mines hid within his Land, and leaſes, his Land, and (*d*) all Mines therein, there the Leſſee may dig for them, for (*e*) *quando aliquis aliquid concedit, concedere videtur & id ſine quo res ipſa eſſe non poteſt*, and therewith agrees 12 Co. 13, 130. Co. Lit. 56. a. 153. a. 2 Inſt. 306. Moor 218. Cawley 246. Hawks Max. 258. 2 Sid. 39.

agrees 9 *E.* 4. 8. where it is ſaid, That if a Man leaſes his Land to another, and in the ſame there is a (*a*) Mine (which is to be intended of a hidden Mine) he cannot dig for it, but if he leaſe his Land and all Mines in it, then although the Mine be hidden, the Leſſee may dig for them; and by Conſequence the Digging of the Mine in the principal Caſe was Waſt in the firſt Leſſee.

(*a*) 2 Bulſt. 252. 12 E. 4. 8. 2. Br. Waſt 125. 9 E. 4. 35. b.

4. It was reſolved, That although the Mine was firſt opened by the firſt Leſſee, yet if his Grantee dig in it, it is Waſt in him.

(*b*) 1 Brownl. 241. Cr. El. 683. Allein 81, 82. 13 Co. 60. Cr. Jac. 296. Poph. 195. 2 Bulſt. 6, 8.

5. It was reſolved, that the Exception was (*b*) void, for firſt by the Exception of the Profits of the Mine, or of the Mine itſelf, the Land is not excepted; and then it follows, that he hath excepted that which he could not have or take: As if a Man aſſigns his Term, and excepts the Timber-trees on the Land, or the Gravel, or Clay within the Land, it is void, for he cannot except to himſelf a Thing which doth not belong to him by the Law. And although it was ſaid, That foraſmuch as the Leſſee firſt opened the Mine, and thereby committed Waſt, and ſo had *quodam modo* appropriated it to himſelf, and by his Wrong had ſubjected himſelf to loſe the Place waſted, and treble Damages, it ſhould be a Reaſon that he might keep it to himſelf, and ſo continue puniſhable for the Waſt of which he was the firſt Author; but notwithſtanding that, it was reſolved as above; for his Wrong which he committeth cannot deveſt the Intereſt in the Mine, being in the Land demiſed to him out of the Leſſor, and therefore he cannot except that to himſelf which belongs to another: And it was adjudged *Paſch.* 28 *Eliz.* in the *Common Pleas*, *Rot.* 820. between *Foſter* and *Miles* Plaintiffs, (*c*) and *Spencer* and *Burde* Defendants, that where the Leſſee for Years aſſigns over his Term except the Timber-trees, and afterwards the Trees were felled, that the Action of Waſt was maintainable againſt the Aſſignee, for the (*d*) Exception was utterly void for the Cauſes aforeſaid, *quod nota bene.* And in this Caſe it was ſaid, if Leſſee for Years deviſes his Term to another, and makes his Executors, and dies, the Executors do Waſt, and afterwards aſſent to the Deviſe, in that Caſe although between the Executors and the Deviſee it hath Relation, and the Deviſee is in by the Deviſor, yet an Action of (*e*) Waſt ſhall be maintainable againſt the Executors in the *tenuit.* So if Grantee of a Term on Condition doth waſte, and afterwards the Grantor enters for the Condition broken, the Action of Waſte ſhall be maintainable againſt the Grantee in the *tenuit*, (*f*) 30 *E.* 3. 16. *a. b. acc'*.

(*c*) Goldsb. 63. 1 Leon. 48, 49. Cr. El. 17, 18, 683. 13 Co. 60, 61. Co. Ent. 695. pl. 3. 2 Bulſtr. 6.

(*d*) 1 Leon. 49. Cr. El. 17, 18, 683. 2 Bulſt. 6, 8 Poph. 194.

(*e*) 1 Rol. Rep. 248. 2 Inſt. 302. Swinb. 324. Bridgm. 54.

(*f*) Fitz. Waſt 26.

Mich.

Mich. 41 & 42 Eliz.

ROSSE's *Case.*

BEtween *Peter Rosse* and *Aldwick* in an *Ejectione firmæ*, which began *Pasch.* 33 *Eliz. Rot.* 499. the Case was such; A Lease is made to *A.* and his Assigns, *Habendum* to him during his Life, and the Lives of *B.* and *C.* and if this Limitation during the Life of *B.* and *C.* were void or not was the Question. And it was adjudged, That the Limitation was good; for where it was objected, That when a Man hath two Estates in him, the greater shall drown the Less, and that an Estate for his own Life is higher than for the Life of another, and therefore an Estate for his own Life, and for the Lives of others cannot stand together, To that it was answered and resolved, That in the Case at Bar, the Lessee had but one Estate, which hath this Limitation, *scil.* during his Life, and the Lives of two others, and he hath but one Freehold, and therefore there cannot be any drowning of Estates in the Case, but he hath an Estate of Freehold to continue during these three Lives, and the Survivor of them.

Moor 398, 399. Gold. 157, 158. Cr. El. 491, 492.

1 Bulstr. 136. Cr. Jac. 282. Cr. El. 58, 182. 2 Bulstr. 135. Moor 8. Co. Lit. 41. b. 2 Leon. 1. 2 Rol. 445, 446, 472. Rol. Rep. 178.

Mich.

Mich. 42 & 43 Eliz.

In the King's Bench.

The Counteſs of SHREWSBURY's *Caſe.*

Cr. El. 777, 784.

THE Counteſs of *Shrewsbury* brought an Action on the Caſe againſt *Richard Crompton* a Lawyer of the *Temple*, and declared, That ſhe leaſed to him a Houſe at Will, *& quod ille tam negligenter & improvide cuſtodivit ignem ſuum, quod domus illa combuſta fuit:* To which the Defendant pleaded Not guilty, and was found guilty, *&c.* And it was adjudged that for this *(a)* permiſſive Waſt no Action lay, againſt the Opinion of *Brook* in the Abridgment of the Caſe of 48 *E.* 3. 25. *(b) Waſt* 52. And the Reaſon of the Judgment was, becauſe at the Common Law no Remedy lay for Waſt, either voluntary or permiſſive againſt Leſſee for Life *(c)* or Years, becauſe the Leſſee had Intereſt in the Land by the Act of the Leſſor, and it was his Folly to make ſuch Leaſe, and not reſtrain him by Covenant, Condition, or otherwiſe, that he ſhould not do Waſt. So and for the ſame Reaſon, a Tenant at Will ſhall not be puniſhed for permiſſive Waſt. But the Opinion of *Littleton* is good Law, *fol.* 152. If Leſſee at Will commits *(d)* voluntary Waſt, *ſcil.* in Abatement of the Houſes, or in Cutting of the Woods, there a general Action of Treſpaſs lies againſt him. For as it is ſaid in 2 & 3 *Phil. & Mar. Dyer* 122. *b.* when Tenant at Will takes upon him to do ſuch Things which none can do but the Owner of the Land, theſe amount to the Determination of the Will, and of his Poſſeſſion, and the Leſſor ſhall have a general Action of Treſpaſs without any Entry: And there 15 *E.* 4. 20. *b.* is cited, That if a *(e)* Bailee of Goods, as of a Horſe, *&c.* kill them, the Bailor ſhall have a general Action of Treſpaſs, for by the Killing the Privity was determined. But it was agreed that in ſome Caſes, when there is a Confidence repoſed in the Party, the Action upon the Caſe will lie for Negligence, although

(a) Co. Lit. 57. a.
(b) Br. Waſt 51.
(c) Cr. El. 777. 2 Inſt. 299. Stat. Glouc. c. 5. Dr. & Stud. 60. a. 4 Co. 62 b. 6 Co. 43. a. Salk. 19. 6 A. c. 31. 10 A. c. 14.
(d) Cr. El. 777, 784. Cr. Car. 187. Noy 51. Lit. ſect. 71. Co. Lit. 57. a. 1 Rol. 860. 2 Rol. 555, 556. Raym. 148.
(e) Co. Lit. 57. a. Cr. El. 784. 18 E. 4. 27. b. 11 Co. 82. a. Moor 248. 1 Leon. 87, 88. Goldsb. 66, 67, 72. Owen 52. Dyer 121., pl. 17. Moor 248.

although the Defendant comes to the Poſſeſſion by the Act of the Pl. As (a) 12 *E.* 4. 13. *a. b.* where a Man delivers a Horſe to another to keep ſafe, the Defendant *equum illum tam negligenter cuſtodivit, quod ob defectum bonæ cuſtodiæ interiit*; the Action on the Caſe lies for this Breach of the Truſt. So 2 *H.* 7. 11. if my (b) Shepherd, whom I truſt with my Sheep, and by his Negligence they be drowned, or otherwiſe periſh, an Action upon the Caſe lies: But in the Caſe at Bar it was a Leaſe at Will made to the Defendant, and no Confidence repoſed in him; wherefore it was awarded, that the Plaintiff take nothing by her Bill.

(a) Fitz. action ſur le Caſe 19. Br. action ſur le Caſe 97.
(b) Cr. El. 777, 784. Lit. ſect. 71. Owen 52. Moor 248. Dy. 121. pl. 17. Goldsb. 72.
(c) Co. El. 777.

Mich. 43 & 44 *Eliz.*

IN THE

High Court of PARLIAMENT.

The Caſe of Eccleſiaſtical Perſons.

AT a Parliament held in the ſame Term upon Conſideration of a Bill for Confirmation of Conveyances made by the Subjects to the Queen, and of Letters Patents made by the Queen to Subjects. It was reſolved by the Chief Juſtices, *Popham* and *Anderſon*, and by divers other Juſtices aſſiſtant to the Lords of Parliament in the Upper Houſe, That Leaſes made to the Queen by Colleges, Deans and Chapters, Wardens of Hoſpitals, or any other having Spiritual or Eccleſiaſtical Livings, againſt the Proviſion of the Act of 13 *Eliz.* (a) *cap.* 10. are reſtrained by the ſame Act, as well as Leaſes made to common Perſons.

1. Becauſe the Eccleſiaſtical Perſons are diſabled by the Act to make any Leaſe, Gift, Grant, Feoffment, Conveyance, or Eſtate, but only in the ſame Form as the Statute preſcribes;

Full. Ch. Hiſt. l. 10. p. 27.
(d) 10 Co. 60. b. 11 Co. 67. a. 70. a. 73. a. 75. b. 76. a. 1 Rol. Rep. 152, 155, 158, 160, 164, 166, 236. Carter 13. Hardres 302, 445. 1 Jones 21. Jenk. Cent. 255, 256. Antea 6. b. Cr. Argument 60. Co. Lit. 43. a. 44. b. 301. a. 342. a.

prescribes; and if they are disabled to make Estates, then the Queen cannot take any Estate of them, which is not warranted by the said Act. For altho' the Queen by the Common Law hath Ability to take it, yet for as much as the Parliament hath disabled them to make Estates, the Estates made to the Queen against the Act are void.

(a) 11 Co. 71. b.
(b) 2 Inst. 358, 681. Co. Lit. 43. b. 99. a. 120. a. 11 Co. 70. a. b. 72. a. 2 Sid. 69. 1 Rol. Rep. 152, 153, 165, 167. Cr. Car. 526.
(c) 35 H. 6. 61. a.
(d) Co. Lit. 344. b. 2 Inst. 353, 354, &c.
(e) Plowd. 243. b. 244. a. b. 248. b. 251. b. 252. a. 1 Co. 44. b. 48. a. 7 Co. 21. a. 23. a. 11 Co. 72. a. 1 Rol. Rep. 153.
(f) Rast. Leases 4.
(g) 1 Rol. Rep. 167. Hardr. 302. 10 Co. 55 a. Co. Lit. 341. a. 2 Bulstr. 53. Hob. 295. Hawk. Max. 2 Wing. Max. 3.
(h) 11 Co. 76. a. Palm. 216. 1 Rol. Rep. 164. Co. Lit. 342. a.
(i) Eytrue's Case, Pasch. 14 Eliz. in Communi Banco. 10 Co. 60. b. 1 Rol. Rep. 160, 164. Hob. 97. 11 Co. 69. b.
(k) Bridg. 30. Hob. 97. 10 Co. 61. a. 11 Co. 69. b. Cr. Car. 49. 1 Rol. Rep. 160.

2. The Stat. of 1 *Eliz.* which restrains Bishops to make Estates, hath a special (a) Provision, that they may make Estates to the Queen; which proves, that if such Provision had not been made for the Queen, for as much as the Act doth disable Bishops to make Estates, the Queen could not take Estate from them against the Provision of the Act, but no such Provision is in the said Act of 13 *Eliz.*

3. In divers Cases the King is (b) bound by Act of Parliament, altho' he be not named in it, nor bound by express Words. And therefore all Stat. which are made to suppress Wrong, or to take away Fraud, or to prevent the Decay of Religion, shall bind the King altho' he be not named: For Religion, Justice, and Truth are the sure Supporters of the Crowns and Diadems of Kings. And therefore it is agreed in 35 *H.* 6. 60. that the (c) King shall be bound by the Stat. of *West.* 2. (d) *cap.* 5. which makes Provision against tortious Usurpations, altho' the K. be not named in the Act. So in the Lord *Barkley*'s Case reported by Mr. *Plowden*, it is adjudged, That if a Gift in Tail be made to the King, he can't alien to defraud him in Reversion, or his Issue, but is (e) bound by the Stat. of *West.* 2. *De donis conditionalibus*. And the said Act of (f) 1 *Eliz.* proves, That Acts which restrain Ecclesiastical Persons from wasting their Possessions, which were given to maintain the Service of God, shall bind the King, if special Provision had not been made to the contrary by the same Act; *Et* (g) *summa ratio est quæ pro religione facit.* Sir *Tho. Egerton* Lord Keeper of the Great Seal, agreed in Opinion with the Justices aforesaid in the principal Case: Note Reader, the said Act of 13 *Eliz.* hath been construed (h) beneficially, to prevent all Inventions and Evasions against the true Intent of the Makers of the Act. And therefore it was held *Pasch.* 14 *Eliz.* in the *Common Pleas* in (i) *Eitrue*'s Case, That if a Writ of Annuity be brought against a Parson or a Vicar on a feigned Prescription, or by a Grant by him, the Patron and Ordinary, supposed to be made before the Statute; and he prays in Aid of the Patron and Ordinary, and loses by Action tried, and all this is feigned to make an Evasion out of this Act, that this Invention is taken within the Equity of it; for although the (k) Annuity charge the Parson or Vicar and not the Possessions, yet it is within the Mischief, *scil.* impoverishing of the Successor, Cause of Dilapidations, and Decay of Spiritual Livings, and Hospitals, which are the Mischiefs mentioned in the

Preamble. And note this Word (*suffered*) in the Act was well observed.

It was adjudged in the *Com. Pleas, Mich.* 37 & 38 *Eliz.* between the Dean and Chapter of *Hereford*, and the Bishop of *Hereford* (*a*) and *Ballard*, That the Grant of the next (*b*) Avoidance of a Benefice by the Dean and Chapter was within the Purview of this Act; so it was resolved there, If a Dean and Chapter grant a (*c*) Rent-Charge out of their Possessions, it is restrained by the Equity of the Act; and yet the Rent is not any Part of their Possess. within the Words of the Act. It hath been held, That where an Archdeacon made a Lease for three Lives according to this Act, and the Lessees made a Lease for 100 Years, and the Archdeacon, Bishop, and the Dean and Chapter confirmed it; yet it should not bind the Successor; for if such Confirmation should not be said a Conveyance within this Act, the Statute would be to little or no Purpose, and the good Intent and Purview of the Act would be defeated and defrauded.

(*a*) Cr. El. 440. Bishop of Heref. Case. Mich. 37 & 38 Eliz. in Communi Banco.
(*b*) Cr. El. 207, 690. 3 Co. 59. b.
(*c*) Dyer 370. pl. 62.

And it was held *Trin.* 30. *Eliz.* in a Case depending by *English* Bill in the Exchequer-Chamber, between *Hodges* Pl. and (*d*) *Newcomen* Def. by Sir *Roger Manwood* Ch. Baron, and all the Barons of the Exchequer, That where the Parson of *Weston* in the County of *Glouceſter* 9 *Eliz.* demised his Rectory to *Will. Hodges* then Patron of the same Rectory for 50 Years, who 14 *Eliz.* by his Deed assigned it over to Sir *John Throgmorton*, the Bishop confirmed this Lease 17 *Eliz.* in the Life of the Lessor, that the said Confirmations were good. And in that Case two Points were resolved.

(*d*) Newcomen's Case, Trin. 30 Eliz. in the Exchequ. 1 Rol. Rep. 171, 361. 2 Rol. Rep. 9. Co. Lit. 301. b. 1 Rol. 481. Cr. Car. 38. 3 Bulst. 238. Bridg. 83.

1. That for as much as the said Lease was made before the Stat. of 13 *Eliz.* and so not restrained by the said Act, the (*e*) Confirmations made after the said Act to perfect the said Lease, were not within the Purview or Intention of the Act.

(*e*) Cr. El. 18, 430. Cr. Jac. 53. Co. Lit. 301. b. 302. a.

2. It was resolved, that the Grant made by the Patron of the said Lease, did (*f*) import in it self as well a Grant of the Term, as a Confirmation of the same Term: And so one Deed of one and the same Thing by one and the same Person, to one and the same Person, and at one and the same Time shall enure to two several Purposes, *scil.* to a Grant of the Interest as Lessee, and to a Confirmation of the same Interest as Patron. As if (*g*) Tenant for Life grants a Rent-Charge to him in the Rev'n in Fee, and he by Deed grants it over to another and his Heirs, that is a good Grant and Confirmat. also to make the Rent good for ever. So if a (*h*) Disseisor makes a Lease for Life, the Remainder to the Disseisee, and the Disseisee grants the Remainder over, it is a good Grant and Confirmation also.

(*f*) Co. Lit. 301. b.
(*g*) Co. Lit. 302
(*h*) Co. Lit. 302. a.

And in the principal Case the Lords of the Parliament, after the said Resolution, being informed, that divers Deans and Chapters, Colleges, &c. had made Leases to the Queen, intending that the Queen was not bound by the said Act of 13 *Eliz.* caused a Clause

to

to be added in the first Branch of the Act of Confirmation that it should not extend to make any Lease, Grant, &c. good to the Queen by any Ecclesiastical Person, &c. who had not Power by the Laws and Statutes of the Realm to make it, which is more than was in the Act of Confirmations in *anno* 18 *Eliz.* which was done to manifest the Matter to the Lay-people; for it was held by the said Justices, That the general Words of the said Act of 18 *Eliz.* hath not enabled such Ecclesiastical Persons to make Leases or Estates to the Queen, who by the said Act of 13 *Eliz.* were upon good and important Considerations disabled. *Vide* 17 *E.* 3. 40. & 21 *E.* 3. 46. The King being Head of the Commonwealth, cannot be an Instrument to defeat the Purview of an Act of Parliament made *pro bono publico.*

4. Co. 73. a.

11 Co. 76. a.

Covenants.

Covenants, Agreements, &c. concerning Leaſes, Aſſurances, &c.

Paſch. 25 Eliz. *in the King's Bench.*

SPENCER's *Caſe.*

SPencer and his Wife brought an Action of Covenant against *Clark*, Aſſignee to *J.* Aſſignee to *S.* and the Caſe was ſuch: *Spencer* and his Wife by Deed indented demiſed a Houſe and certain Land (in the Right of the Wife) to *S.* for Term of 21 Years, by which Indenture *S.* covenanted for him his Executors and Adminiſtrators with the Plaintiffs, that he, his Executors, Adminiſtrators, or Aſſigns, would build a Brick Wall upon Part of the Land demiſed, &c. *S.* aſſigned over his Term to *J.* and *J.* to the Defendant; and for not making of the Brick Wall the Plaintiffs brought the Action of Covenant againſt the Defendant as Aſſignee: And after many Arguments at the Bar, the Caſe was excellently argued and debated by the Juſtices at the Bench: And in this Caſe theſe Points were unanimouſly reſolved by Sir *Criſtopher Wray* Chief Juſtice, Sir *Thomas Gawdy*, and the whole Court. And many Differences taken and agreed concerning expreſs Covenants, and Covenants in Law, and which of them run with the Land, and which of them are collateral, and do not go with the Land, and where the Aſſignee ſhall be bound without naming of him, and where not; and where he ſhall not be bound although he be expreſly named, and where not. 2 Balſtr. 281, 282. Moor 159.

1. When the Covenant extends to a Thing in *eſſe*, Parcel of the Demiſe, the Thing to be done by Force of the Covenant is *quodam-*

quodammodo annexed and appurtenant to the Thing demiſed, and ſhall go with the Land, and ſhall bind the Aſſignee *(a)* altho' he be not bound by expreſs Words: But when the Covenant extends to a Thing which is not in Being at the Time of the Demiſe made, it cannot be appurtenant or annexed to the Thing which hath no Being: As if the Leſſee covenants to repair the Houſes demiſed to him during the Term, that is Parcel of the Contract, and extends to the Support of the Thing demiſed, and therefore is *quodammodo* annexed and appurtenant to Houſes, and ſhall bind the Aſſignee altho' he be not bound expreſly by the Covenant: But in the Caſe at Bar, the Covenant concerns a Thing which was not in *eſſe* at the Time of the Demiſe made, *(b)* but to be newly built after, and therefore ſhall bind the Covenantor, his Executors, or Adminiſtrators, and not the Aſſignee, for the Law will not annex the Covenant to a Thing which hath no Being.

(a) Moor 27, 399. Co. El. 457, 552, 553. 1 Rol. 521, 522. Poſtea 24. 1 Sand. 239. Cr. Jac. 125. Cr. Car. 222, 523. 1 Jones 245. 1 Siderf. 157. 1 Anderſ. 82. 1 Show. 284. 4 Mod. 80. 3 Lev. 326. Salk. 185, 317.

(b) Cr. El. 457. Cr. Car. 439. Dy. 14. pl. 69. 1 Anderſ. 82. Moor 159.

2. It was reſolved that in this Caſe, If the Leſſee had covenanted for him and his *(c)* Aſſigns, that they would make a new Wall upon ſome Part of the Thing demiſed, that for as much as it is to be done upon the Land demiſed, that it ſhould bind the Aſſignee; for altho' the Covenant doth extend to a Thing to be newly made, yet it is to be made upon the Thing demiſed, and the Aſſignee is to take the Benefit of it, and therefore ſhall bind the Aſſignee by expreſs Words. So on the other Side, If a Warranty be made to one, his Heirs and Aſſigns, by expreſs Words, the Aſſignee ſhall take Benefit of it, and ſhall have a *(d) Warrantia Chartæ*, *F. N. B.* 135. & 9 *E.* 2. *Garr' de Charters* 30. 36 *E.* 3. *Garr.* 1. 4 *H.* 8. *Dier* 1. But altho' the Covenant be for him and his Aſſigns, yet if the Thing to be done be meerly collateral to the Land, and doth not touch or concern the Thing demiſed in any Sort, there the Aſſignee ſhall not be charged. As if the Leſſee covenants for him and his Aſſigns to build a Houſe upon the Land of the Leſſor which is no Parcel of the Demiſe, or to pay any collateral Sum to the Leſſor, or to a Stranger, it ſhall not bind the Aſſignee, becauſe it is meerly collateral, and in no Manner touches or concerns the Thing that was demiſed, or that is aſſigned over; and therefore in ſuch Caſe, the Aſſignee of the Thing demiſed cannot be charged with it, no more than any other Stranger.

(c) Moor 159, 399. 1 Jones 223. 1 Rol. Rep. 360. Cr. Car. 25, 188.

(d) F. N. B. 135. d. Co. Lit. 384. b.

3. It was reſolved, If a Man leaſes *(e)* Sheep or other Stock of Cattle, or any other perſonal Goods for any Time, and the Leſſee covenants for him and his Aſſigns at the End of the Time to deliver the like Cattle or Goods as good as the Things letten were, or ſuch Price for them; and the Leſſee aſſigns the Sheep over, this Covenant ſhall not bind the Aſſignee, for it is but a perſonal Contract, and wants ſuch *(f)* Privity as is between the Leſſor and Leſſee and his Aſſigns

(e) 2 Jones 152. 1 Leon. 43. Swinb. 324.

(f) Cr. Car. 188.

of

of the Land in Respect of the Reversion. But in the Case of a Lease of personal Goods there is not any Privity, nor any Rev'n (*a*) but merely a Thing in Action in the Personalty, which cannot bind any but the Covenantor, (*b*) his Executors, or Administrators, who represent him. The same Law, if a Man demises a House and Land for Years, with a Stock or Sum of Money rendering Rent, and the Lessee covenants for him, his Executors, Administrators, and Assigns, to deliver the Stock or Sum of Money at the End of the Term, yet the Assignee shall not be charged with this Covenant, for altho' the Rent reserved was increased in Respect of the Stock or Sum, yet the Rent did not issue out of the Stock or Sum (*c*), but out of the Land only; and therefore as to the Stock or Sum the Covenant is personal, and shall bind the Covenantor, his Executors and Administrators, and not his Assignee: And it is not certain that the Stock or Sum will come to the Assignees Hands, for it may be wasted, or otherwise consumed or destroyed by the Lessee, and therefore the Law can't determine at the Time of the Lease made, that such Covenant shall bind the Assignee.

(*a*) 1 Leon. 43.
(*b*) Swinb. 324.
(*c*) Kelw. 153, b. 1 And. 4. Dyer 56. pl. 15, 16, 212. pl. 37, 38. 21 E. 4. 29. a. 3 Bulst. 291. 9 E. 4. 1. b.

4. It was resolved, that if a Man makes a Feoffment by this Word (*d*) *Dedi*, which implies a Warranty, the Assignee of the Feoffee shall not vouch: But if a Man makes a Lease for Years by this Word *Concessi*, (*e*) or *Demisi*, which implies a Covenant, if the Assignee of the Lessee be evicted, he shall have a Writ of Covenant; for the Lessee and his Assignee hath the yearly Profits of the Land which shall grow by his Labour and Industry for an annual Rent, and therefore it is reasonable when he hath applied his Labour, and employed his Cost upon the Land, and be evicted (whereby he loses all) that he shall take such Benefit of the Demise and Grant, as the first Lessee might, and the Lessor hath no other Prejudice than his especial Contract with the first Lessee hath bound him to.

(*d*) 2 Inst. 275. 4 Co. 81. a. 1 Co. 2. b. Co. Lit. 384. a. Yelv. 139. Perk. sect. 124.
(*e*) 4 Co. 81. a. Yelv. 139. Co. Lit. 384. a. Perk. Sect. 124. Dall. 101. Cr. Jac. 73. 2 Inst. 276. F. N. B. 134. h. Hob. 12. 1 Vent. 44. 1 Rol 521.

5. Tenant by the Curtesy, or any other who comes in the Post shall not vouch (which is in lieu of an Action.) But if (*f*) a Ward be granted by Deed to a Woman who takes Husband, and the Woman dies, the Husb. shall vouch by Force of this Word *Grant*, altho' he comes to it by Act in Law; So if a Man demises or grants Land to a Woman for Years, and the Lessor covenants with the Lessee to repair the Houses during the Term, the Woman marries and dies, the Husband shall have an Action of Covenant as well on the Covenant in Law on these Words (demise or grant) as on the express Covenant, The same Law is of Ten't by Statute-Merchant or Statute-Staple, or *Elegit* of a Term, and he to whom a Lease for Years is sold by Force of any Execution, shall have an Action of Covenant in such Case as a Thing annexed to the Land, altho' they come to the Term by Act in Law; as if a Man grant to Lessee

(*f*) 1 Rol. 743.

* Poſt. 24. b. F. N. B. 181. n.

for Years, that he ſhall have ſo many * Eſtovers as will ſerve to repair his Houſe, or as he ſhall burn in his Houſe, or the like, during the Term, it is as appurtenant to the Land, and ſhall go with it as a Thing appurtenant. into whoſe Hands ſoever it ſhall come.

(a) Ant. 16. a. b. Poſt. 24. b. Cr. Jac. 240, 309. 439. 1 Jones 223. Cr. El. 373. 1 Sid. 157.

6. If Leſſee for Years covenants to repair the Houſes during the Term, (a) it ſhall bind all others as a Thing which is appurtenant, and goeth with the Land in whoſe Hands ſoever the Term ſhall come, as well thoſe who come to it by Act in Law, as by the Act of the Party, for all is one having Regard to the Leſſor. And if the Law ſhould not be ſuch, great Prejudice might accrue to him; and Reaſon requires, that they, who ſhall take Benefit of ſuch Covenant when the Leſſor makes it with the Leſſee, ſhould on the other Side be bound by the like Covenants when the Leſſee makes it with the Leſſor.

(b) 1 Rol. 521. 1 Rol Rep. 81, 82. 2 Bulſt. 281. Owen 151, 152.

7. It was reſolved, That the Aſſignee (b) of the Aſſignee ſhould have an Action of Covenant. So of the Executors of the Aſſignee of the Aſſignee; ſo of the Aſſignees of the Executors or Adminiſtrators of every Aſſignee, for all are compriſed within this Word (*Aſſignees*) for the ſame Right which was in the Teſtator, or Inteſtate, ſhall go to his Executors or Adminiſtrators: As if a Man makes a Warranty to one, his Heirs and Aſſigns, the Aſſignee (c) of the Aſſignee ſhall vouch, and ſo ſhall the Heirs of the Aſſignee: The ſame Law of the Aſſignee of the Heirs of the Feoffee, and of every Aſſignee. So every one of them ſhall have a Writ of *Warrantia Charte*. *Vide* 14 *E.* 3. *Garr.* 33. 38 *E.* 3. 21. 36 *E.* 3. *Garr.* 1. 13 *E.* 1. *Garr.* 93. 19 *E.* 2. *Garr.* 85, *&c.* For the ſame Right which was in the Anceſtor, ſhall deſcend to the Heir in ſuch Caſe without expreſs Words of the Heirs of the Aſſignees.

(c) Cr. El. 534. Co. Lit. 384. b.

Obſerve Reader your old Books, for they are the Fountains out of which theſe Reſolutions iſſue, but perhaps by theſe Differences the Fountains themſelves will be made more clear and profitable to thoſe who will make Uſe of them. For Example (d) in 42 *E.* 3. 3. the Caſe is; Grandfather, Father, and two Sons, the Grandfather was ſeiſed of the Manor of *D.* whereof a Chappel was Parcel, a Prior with the Aſſent of his Covent by Deed covenanted for him and his Succeſſors, with the Grandfather and his Heirs, that he and his Covent would ſing all the Week in his Chappel, Parcel of the ſaid Manor, for the Lords of the ſaid Manor and his Servants, *&c.* The Grandfather did infeoff one of the Manor in Fee, who gave it the younger Son and his Wife in Tail; and it was adjudged, that the Tenants in Tail, as (e) Tertenants (for the elder Brother was Heir) ſhould have an Action of Covenant againſt the Prior, for the Covent is to do a Thing which is annexed to the Chappel, which is within the Manor, and ſo annexed to the Manor, as it is there ſaid. And *Finchden* related, That he had ſeen it

(d) Co. Lit. 384. a. 1 Rol. 520, 521. Br. Covenant 5. Statham Covenant 3.

(e) Co. Lit. 385. a.

adjudged, that two (*a*) Coparceners made Partition of Land, and one did covenant with the other to acquit him of Suit which was due, and that Coparcener to whom the Covenant was made did alien, and the Suit was arrear; and the Feoffee brought a Writ of Covenant againſt the Coparcener to acquit him of the Suit; and the Writ was maintainable, notwithſtanding he was a Stranger to the Covenant, becauſe the Acquittal fell upon the Land: But if ſuch Covenant were made to ſay divine Service in the (*b*) Chappel of another, there the Aſſignee ſhall not have an Action of Covenant, for the Covenant in ſuch Caſe cannot be annexed to the Chappel, becauſe the Chappel doth not belong to the Covenantee, as it is adjudged in (*c*) 2 *H.* 4. 6. *b.* But there it is agreed, that if the Covenant had been with the Lord of the Manor of *D.* and his Heirs, Lords of the Manor of *D.* and Inhabitants therein, the Covenant ſhall be annexed to the Manor, and there the Tertenant ſhall have the Action of Covenant without Privity of Blood. *Vide* 29 *E.* 3. 48. & 30 *E.* 3. 14. *Simpkin* (*d*) *Simeon's* Caſe, where the Caſe was, That the Lady *Bardolf* by Deed granted a Ward to a Woman who married *Simpk. S.* againſt whom the Queen brought a Writ of Right of Ward, and they vouched the Lady *Bardolf*, and afterwards the Wife died, by which the Chattel (*e*) real ſurvived to the Husband (and reſolved that the Writ ſhould not abate) the Vouchee appeared, and ſaid, What have you to bind me to Warranty? The Husband ſhewed, how that the Lady granted to his Wife before Marriage the ſaid Ward; the Vouchee demanded Judgment for two Cauſes.

(*a*) 1 Rol. 521, Co. Lit. 384. b, 385. a. 42 E. 3, 3. b. Br. Covenant 5. 1 Rol. Rep. 81.

(*b*) 1 Rol. 521

(*c*) Co. Lit. 385, a. Fitz. Conant 13. Br. Covenant 17.

(*d*) Co. Lit. 384. a. 2 Rol. 743, 744. 3 Bulſt. 165, Hob. 47. 1 Rol. Rep. 81. Cr. El. 436.

(*e*) 1 Rol. 345. Co. Lit. 351. a.

1. Becauſe no Word of Warranty was in the Deed; as to that it was adjudged, that this Word (*f*) (*Grant*) in this Caſe of Grant of a Ward (being a Chattel real) did import in it ſelf a Warranty.

(*f*) Co. Lit. 384. a.

2. Becauſe the Husband was not Aſſignee to the Wife, nor privy. As to that it was adjudged, That he ſhould vouch, for this Warranty implied in this Word (*Grant*) is in Caſe of a Chattel real ſo annexed to the Land, that the Husband who comes to it by Act in Law, and not as Aſſignee, ſhould take Benefit of it. But it was reſolved by *Wray* Chief Juſtice, and the whole Court, that this Word (*Conceſſi* or *demiſi*) in Caſe of (*g*) Freehold or Inheritance doth not import any Warranty. 11 *H.* 6. 41. *acc', vide* 6 *H.* 4. 12 *H.* 4. 5. 1 *H.* 5. 2. 25 *H.* 8. *Covenant Br.* 32. 28 *H.* 8. *Dier* 28. 48 *E.* 3. 22. *F. N. B.* 145. *C.* 146. & 181. 9 *Eliz. Dier* 257. 26 *H.* 8. 3, 5 *H.* 7. 18. 32 *H.* 6. 32. 22 *H.* 6. 51. 18 *H.* 3. *Covenant* 30. *Old N. B. Covenant*, 46 *H.* 3. 4. 38 *E.* 3. 24. See the Statute of (*h*) 32 *H.* 8. *cap.* 24. which Act was reſolved to extend to Covenants which touch or concern the Thing demiſed, and not to collateral Covenants.

(*g*) Co. Lit. 384. a.

(*h*) 32 H. 8. c. 34. Moor 159. Cr. Jac. 523. 2 Bulſt. 281, 282, 283. 18 and 238, 239. Cr. Car. 25, 222. 1 Anderſ. 82. 2 Jones 154. Owen 152. Stile 316, 317. Co. Lit. 215. a.

Mich. 29 & 30 Eliz. *in a Writ of Error in the Exchequer Chamber.*

SLINGSBY's *Case.*

3 Leon. 160, 161. 2 Leon. 47. Jenk. Cent. 262.

Slingsby and *Frances* his Wife brought an Action of Covenant in the *King's Bench* againſt *Roger Beckwith*, and declared on an Indenture tripartite between the Defendant *Roger Beckwith* of the firſt Part, *William Vavaſor*, *Francis Slingſby*, and *Elizabeth* Siſter of the ſaid *Roger*, of the ſecond Part, and *George Harvy*, and the ſaid *Frances* (then his Wife) another of the Siſters of the ſaid *Roger*, of the third Part. And declared, That the ſaid *Roger Beckwith* the Defendant by the ſaid Indenture (*a*) *conveniſſet*, *promiſiſſet*, & *conceſſiſſet ad & cum dictis* Will. & Franciſco, & *ad & cum præd'* Georgio & Franciſca *uxore ejus*, & *aſſignat' ſuis*, & *ad & cum quolibet*, & *qualibet eorum*, *quod præd'* Rogerus *ad ſigillationem & deliberationem ejuſdem indentur' fuit legitime & ſolus ſeiſitus de Rectoria de* Aldingfleet *in Com' Eborum:* And on this Covenant Iſſue was joined, and the *Venire facias* was *de vicinet' Caſtri Eborum*, and the Iſſue by *Niſi prius* was tried for the Plaintiff, and Damages aſſeſſed, upon which Judgment was given in the *King's Bench*. And now in a Writ of Error in * the *Exchequer-Chamber* before *Anderſon* Chief Juſtice of the *Common Pleas*, *Manwood* Chief Baron of the *Exchequer*, *Windham*, *Periam*, and *Rhodes*, Juſtices of the *Common Pleas*, and *Gent* and *Clark* Barons of the *Exchequer*, and of the Coif, it was reſolved that the ſaid Judgment was † erroneous; for it appears by the Plaintiff's own Shewing in his Declaration, that the Plaintiffs only cannot maintain an Action of Covenant, but the other Covenantees ought to have (*b*) joined in the Action with them, notwithſtanding theſe Words (& *ad & cum* (*c*) *quolibet & qualibet eorum*;) for as to theſe Words this Difference was agreed: When it appears by the Declaration, that every of the Covenantees hath, or is to have, ſeveral Intereſt or Eſtate, there, when the Covenant is made with the Cove-

(*a*) 1 Bulſt. 26.

* 27 Eliz. c. 8.

† 3 Leon. 161. Jenk. Cent. 262. 1 Bulſt. 26.

(*b*) 1 Bulſt. 26. 1 Sand. 155.

(*c*) 3 Leon. 161. 2 Leon. 47.

Covenantees, & *cum quolibet eorum*, theſe Words *cum quolibet eorum*, makes the Covenant ſeveral in Reſpect of their ſeveral (*a*) Intereſts. As if a Man by Indenture demiſes to (*b*) *A.* black Acre, to *B.* white Acre, to *C.* green Acre, and covenants with them, and *quolibet eorum*, that he is lawful Owner of all the ſaid Acres, *&c.* in that Caſe in Reſpect of the ſaid ſeveral Intereſts by the ſaid Words, & *cum quolibet eorum*, the Covenant is made ſeveral: But if he demiſes to them the Acres jointly, then theſe Words *cum quolibet eorum* are void, for a Man by his Covenant (unleſs in Reſpect of ſeveral Intereſts) cannot make it firſt joint, and then to make it ſeveral by the ſame or the like Words, *cum quolibet eorum*: For altho' ſundry Perſons may bind themſelves, & *quemlibet eorum*, and ſo the Obligation ſhall be (*c*) joint or ſeveral at the Election of the Obligee; yet a Man cannot (*d*) bind himſelf to three, and to each of them to make it joint or ſeveral at the Election of ſeveral Perſons for one and the ſame Cauſe; for the Court would be in Doubt for which of them to give Judgment, which the Law will not ſuffer, as it is held in 3 *H.* 6. 44. *b.* There it appears that one brought a Replevin againſt two Perſons for an Ox, who made ſeveral (*e*) Avowries, each by himſelf in his own Right; and there by Advice of all the Juſtices, both the Avowries abated for the Inconveniency, that if both the Iſſues ſhould be found for the Avowants, the Court could not give Judgment to them ſeverally for one and the ſame Thing. Alſo the Covenantor in the Caſe at Bar would be divers Times charged for one and the ſame Thing; and therefore the ſaid Words & *cum quolibet eorum*, are in ſuch Caſe but Words of Amplification and Abundance, and cannot ſever the joint Cauſe of Action. And it was alſo reſolved, That an * Intereſt could not be granted jointly and ſeverally: As if a Man grants *proximam advocationem*, (*f*) or makes a Leaſe for Years of Land to two jointly, and ſeverally, theſe Words ſeverally are void, and they are Jointenants; ſo if a Man makes a Feoffment in Fee by Deed to three, and warrants the Land to them, & *cuilibet eorum*, this Warranty is joint and not ſeveral: But in ſuch Caſe, if their Eſtates were ſeveral, their Warranty ſhould be ſeveral accordingly: But a Power or Authority, as to make Livery, (*g*) or to ſell, *&c.* may be joint and ſeveral, for there they have not any Intereſt or Action, but are as Servants to others. *Vide* 16 *Eliz. Dier* 337, 338. *acc.* Sir (*h*) *Anthony Coke's* Caſe, 6 *E.* 2. *Covenant* (*i*) *Br.* 49. 12 *H.* 4. 18. *in Detinue.* And for this Error the Judgment was reverſed. Another Error was aſſigned concerning the *Viſne*; but as to that the Court did not deliver any Opinion.

(*a*) Antea 7. b.

(*b*) Jenk. Cent. 262. Bridg. 63.

(*c*) Poſtea 21. b.

(*d*) 2 Brownl. 208. Yelv. 177.

(*e*) Plowd. 19. b. Manxel's Caſe. Poſtea 38. b. 21 R. 2. Fitz. Avowry 262.

* Raym 6.

(*f*) Jenk. Cent. 262, 263

(*g*) Jenk. Cent. 263.

(*h*) Antea 8. a. 1 And. 53, 54. n. Benl. 228, 299. Dyer 337, 338 pl. 39.

(*i*) 2 Leon. 4. Antea 8. a.

Paſch. 35 Eliz.

ROSEWEL's *Caſe.*

Cr. El. 297, 298
(*a*) Cr. El. 2. 465, 466. 1 Rol. 466. Moor 143 595, 596.
(*b*) 6 H. 7. 4. a. Br. Condition 133. Fitz. Bar. 149. Cart. 205.
(*c*) Poſtea 20. a. Br. Condition 247. Cr. El. 298.
(*d*) 26 H. 8. 1. b. Br. Condit. 1.

BEtween *Moor* and *Roſewel* it was adjudged, That if a Man bargains and ſells Land in Fee, and covenants to make further Aſſurance to the Bargainee as his Counſel ſhall deviſe; in this Caſe the Bargainee (*a*) himſelf although he be learned in the Law cannot deviſe the Aſſurance, but ſome of his Counſel ought to deviſe it; and therewith agree the Books in (*b*) 6 *H.* 7. & (*c*) 11 *H.* 7. 21. *a.* for if the Party himſelf might deviſe it, then it would be no Plea to ſay, *quod conſilium non dedit adviſamentum. Vide* (*d*) 26 *H.* 8.

Paſch. 35 Eliz.

In the King's Bench.

HIGGINBOTTOM's *Caſe.*

Cr. El. 298, 299
Moor 595, 596.
1 Rol. 424.
Carter 205.

JOHN Stafford Eſquire brought an Action on the Caſe, (which began in the *King's Bench*, *Hill.* 34 *Rot.* 647. *Gloceſtr'*) againſt *Ralph Higginbottom* Parſon of *Littleton* upon *Severn*, becauſe the Defendant upon good Conſideration mentioned in the Declaration, did promiſe that he would make a good and lawful Eſtate and Aſſurance in Law of the Rectory of *Littleton* aforeſaid to the Plaintiff diſcharged of all former Bargains, Sales, &c. made by the Defendant during the joint Lives of the Plaintiff and Defendant, as by Counſel learned of the Plaintiff on Requeſt made, ſhould be adviſed: And alledged that one *Maurice Tovy* was of the Plaintiff's learned Counſel, and gave his Advice to the Plaintiff, That the Defendant ſhould make a Leaſe

a Leaſe by Indenture to the Plaintiff of the ſaid Rectory with the Appurtenances, to have to him during their joint Lives, *&c.* and the Plaintiff gave Notice to the Defendant of the ſaid Advice, and requeſted him to perform it, which the Defendant did deny to do, *&c.* The Defendant pleaded *Non Aſſumpſit*, and it was found for the Plaintiff. And it was moved in Arreſt of Judgment, that this Advice of the Plaintiff's Counſel ought to be given immediately by the Counſellor himſelf to the Defendant, and not to the Plaintiff, and he to give Notice as above. And the Defendant's Counſel did rely ſtrongly on the Book of 11 *H.* 7. 21. for there it is held by all the Juſtices, that the Counſel ought to be given to him who ought to make the Eſtate, and not to him with whom he is of Counſel: And they inſiſted much on the Words of the Book; but on Conſideration of the Book, and on the Reſidue of the ſaid Caſe, afterwards in the ſame Year *fol.* 23. *b.* it appears plainly; and ſo it was reſolved, That the Intent of the Judges was not, that the Counſel could not be given or ſignified to the Party who ſhould make the Eſtate, but only to the Covenantor, becauſe it is Matter whereof by Intendment he who ſhould make the Eſtate (without Notice given) could not have Knowledge. And it was reſolved, That it would be more proper that the Counſellor ſhould give his Counſel to him with whom he is of Counſel, and he to give Notice thereof to him who ſhould make the Eſtate. And altho' he hath two or three of his Counſel, yet none of them may give Advice to him who is to make the Eſtate without his Requeſt, for peradventure he would not uſe their Advice in ſuch Caſe; and it is Reaſon that the Counſel be given to the Party with whom he is of Counſel, for peradventure he may miſlike it, and will not have it notified. 2. It is leſs miſchievous; for if the Party himſelf notify other Advice to him who ſhould make the Eſtate than the Counſellor gave, if the Covenantor knows it, he may refuſe; if he do not know it, and the Counſel notified is according to his Covenant or Agreement, if he perform it, he is excuſed; and if it be not according to his Covenant or Agreement, he may refuſe it, and ſo no Miſchief to the Party; but if the Counſellor ſhould give Advice to him who ſhould make the Eſtate, he may be ignorant, whether he be his Counſel or not. And afterwards Judgment was given for the Plaintiff for the Cauſes before alledged. *Vide* 8 *E.* 4. 1. & 2. 6 *H.* 7. 4. *a.* & 14 *H.* 8. 21. *b.*

Antea 10. b.
Br Condit. 247.
Cr. El. 298.
Cr. El. 298.
1 Rol. 424.
Perk. Sect. 771.
1 Rol. 424.
Cr. El. 298.

Hill. 38 Eliz.

In the King's Bench.

Stile's *Case.*

1 Rol. 22. Cr. El. 472. (a) 2 Brownl. 291. Co. Lit. 143. b. 229. a. 2 Inst. 672. Cr. Jac. 429. (b) Co Litt 35. b. 229. a. 2 Inst. 672. 2 Rol. 21.

BEtween *Frampton* and *Stile* in Debt upon an Obligation; the Defendant said, that it was on Condition to perform Covenants in an Indenture, *hic in Curia prolat'*, and in Truth the Deed was not indented, but wrote *hæc indentura:* And it was adjudged, that it was (a) not an Indenture, although it was in two Parts; for the Words of a Deed cannot make it indented: But to the Making of an Indenture there ought to be a manual Act of Indenting of the (b) Parchment, or Paper; and because the Defendant did not shew any Indenture, the Plaintiff had Judgment.

Pasch. 38 Eliz.

Rot. 42. *in Error, In the King's Bench.*

Sir Anthony Main's *Case.*

Co. Ent. 244. pl. 6. Jenk. Cent. 256. Moor 452, 453. Cr. El. 450, 479. 2 And. 18. Poph. 109, 110.

THE Case in Effect was, That Sir *Anthony Main* did lease certain Land to *Scot* for 21 Years by Indenture, and covenanted that at any Time during the Life of *Scot* upon Surrender of his Lease, Sir *Anthony*, &c. would make a new Lease during the Residue of the Years, and bound himself to perform the Covenants, &c. And now in Debt on the said Obligat. by *Scot* against Sir *Anth.* he pleaded that *Scot* did not surrender, &c. To which *Scot* replied, and said, that after

after the ſaid Leaſe Sir *Anthony* had accepted a Fine *ſur conuſans de droit come ceo*, &c. and by the ſame Fine granted and rendred the Land to the Conuſee for 80 Years: Upon which the Def. did demur in Law. And it was adjudged for the Pl. And in this Caſe three Points were reſolved:

1. That S. *Ant. Main* had broke his Covenant without any *(a)* Surrender made, for by the ſaid Fine levied by him for 80 Years, he had *(b)* diſabled himſelf either to take a Surrender, or to make a new Leaſe; and the Law will not enforce any one to do a Thing which will be vain and fruitleſs *(c) Lex nemin' cogit ad vana ſeu inutilia peragenda*: But it would be vain to compel him to make a Surrender to him who cannot take it; and altho' the Leſſee in this Caſe by the Words of the Indenture ought to do the firſt Act, *ſcil.* to make the Surrender, yet when the Leſſor hath diſabled himſelf not only to take the Surrender, but alſo to make a new Leaſe according to the Covenant, for this Cauſe the Leſſors Covenant is broke without any Surrender made. *Vide* 32 *E.* 3. *(d) Barre* 264. & 21 *E.* 4. *(e)* 55. *a.* If you are bound to enfeoff me of the Manor of *D.* before ſuch a Feaſt, if you make a Feoffment of the ſaid Manor to another before the ſaid Feaſt, you have forfeited your Obligation, altho' you repurchaſe the Land again before the Feaſt, becauſe you were once diſabled to make the Feoffment. And therewith agreeth *Temp. E.* 1. *Covenant* 29. If a Man leaſes a Manor for Years, and the Leſſee covenants to keep the Houſes of the Manor, and as much as was in the Manor in as good Plight as he found them, during the Term, the Leſſee committed Waſt in the Houſes, and in cutting of Oaks, the Leſſor brought an Action of Covenant *(f)* before the End of the Term for the Oaks, becauſe for them it was impoſſible that the Covenant ſhould be performed: Otherwiſe is it of the Houſes; and therewith agree *F. N. B.* 145. *k.* & 12 *E.* 3. *Covenant* 2.

2. It was reſolved, If a Man ſeiſed of Lands in Fee, covenants to enfeoff *J. S.* of them upon requeſt, and *(g)* afterwards he makes a Feoffment in Fee of the ſaid Lands; now in this Caſe *J. S.* ſhall have an Action of Covenant without Requeſt. And that in Effect is all one with the principal Caſe.

3. It was reſolved that in the Caſe at Bar, If the ſaid Term of 80 Years were but an Intereſt of a future Term, ſo that *Scot* notwithſtanding that might make the Surrender, yet in ſuch Caſe *Scot* ſhould have an Action of Covenant without making any Surrender; for true it is that he may Surrender; but alſo true it is, that Sir *Anthony* after ſuch Surrender cannot make the new Leaſe, which was the Effect that the Surrender ſhould produce; and therefore in as much as the Leſſor hath diſabled himſelf to make a new Leaſe, which is the Effect and End of the Surrender, and that which he ought to do on his Part, the Leſſee ſhall not be enforced to make the Surrender, which is the firſt Thing to be done on his Part, for

(a) Hardres 387. 2 Rol. Rep. 347, 348, 408. Hutt. 48. Winch. 29. Cr. El. 450, 479. Jenk. Cent 256. Moor 453. Poph. 109. Raym. 26.
(b) 1 Bulſtr. 117. Perk. ſect. 767, 801. Lit. ſect. 355, 356, 357, 358. 1 Co. 25. b. Co. Lit. 221. a. b. 222. a. 2 Co. 59. b. 79. a. 13 H. 7. 23. b. Br. Condition 26, 217. 44 Aſſ. 26. 20 H. 6. 34. b. Cr. El. 450, 479. Moor 323, 452, 453, 626. 2 Anderſ. 18. Poph. 110, 198. Hutt 48. 1 Rol. 447, 448. 3 Co. 29. a. b. 10 Co. 49. b. 1 Rol. Rep. 168. Hardr. 387. 7 H. 4. 16. a. 8 Co. 83. a. O Benl. 77.
(c) 2 Rol. Rep. 408. Hard. 387. b. Co. Lit. 127. b. 197. b. Poſtea 89. a.
(d) Cr. El. 479.
(e) 8 Co. 83. a.
(f) 7 Co. 15. a. F. N. B. 145. K. Moor 313, 323. 2 Rol. Rep. 332, 347. Godb. 335.
(g) 1 Bulſtr. 117.

for by the Surrender he would loſe his old Term without a Poſſibility of having the New according to the Leſſor's Covenant. And therewith agreeth 14 *H.* 4. 19. a. *J.* (*a*) Parſon of the Church of *G.* was bound in an Obligat. of 100*l.* to the Prior of *E.* the Condition was, That if the Parſon reſign his Church within certain Time to the Prior for a certain Penſion as they could agree, that then the Obligation ſhould be void; and afterwards and within the Time, the Prior and Parſon agreed of a Penſion of 5*l.* yet the Parſon did refuſe to reſign. And the Opinion of the whole Court was, That although they had agreed of the Penſion, yet the Parſon is not bound to reſign until he be ſure of the Penſion, and that he cannot be without Deed. And therefore in ſuch Caſe the Parſon is not obliged to reſign until the Prior hath tendred him a Deed of the ſaid Penſion, by which he might be ſure of it.

(*a*) 2 Rol. Rep. 408. Perk. ſect. 774. 14 H. 4. 18. b. Fitz. Bar. 190. Br. Condition 42.

Trinit. 37 Eliz.

In the King's Bench.

LAUGHTER's *Caſe.*

Cr. El. 398, 399. Poph. 98. Moor 357. 2 Jones 96. 2 Rol. Rep. 216.

THomas Eaton Eſquire, and *Roger Monox* Gent. brought an Action of Debt on a Bond of 400*l.* bearing Date 26 *Sept.* 26 *Eliz.* againſt *Thomas Laughter.* The Defendant demanded *Oyer* of the Bond and Condition; and it appeared by the Bond, that *Richard Ramsford* was alſo bound in the ſaid Bond with the Defendant jointly and ſeverally: And the Condition was in Effect, "That if the within "bounden *Rich' Ramsford* after lawful Marriage had be-"tween him and *Jane Gilman* Wife of *Henry Gilman* de-"ceaſed, and together with the ſaid *Jane*, do and ſhall law-"fully ſell and alien in Fee-ſimple, or Fee-tail, all the great "Meſſuage with the little Tenement thereunto adjoining, "of the ſaid *Jane*, ſituate in *London*, now in the Occu-"pation of *William Fitzw.* Eſquire, If then the ſaid "*Richard Ramsford* do or ſhall either in this Life-time "purchaſe to the ſaid *Jane*, and her Heirs, and Aſſigns,

"Lands,

" Lands, Tenements, and Hereditaments, of as good Right, " and of as good Value, as the Mony by him received or " had by or upon his Sale or Alienation of the Premiſſes " ſhall amount unto: Or elſe do or ſhall leave unto her " the ſaid *Jane* as Executrix, or by Legacy, or other good " Aſſurance or Conveyance, as much Mony as ſhall be by " him received upon ſuch, *&c.* that then, *&c.* And pleaded that the ſaid *Richard Ramsford* married the ſaid *Jane* 1 *Decemb.* 27. and that the ſaid *Jane* died 8 *Auguſt* 31. and the ſaid *Richard Ramsford* ſurvived her; The Plaintiff ſhewed by Way of Replication, that the ſaid *Ramsford* and *Jane Paſch.* 30 *Eliz.* for 320*l.* levied a Fine of the Premiſſes to *John Thompſon* and *William Kerwen*, and to the Heirs of *John Thompſon*; and that the ſaid *Ramsford* did not purchaſe Lands, Tenements, or Hereditaments, of the Value of 320*l.* to the ſaid *Jane* and her Heirs, *neque reliquit præd'.* Jane *poſt deſceſſum ipſius* Rich. *ut executrici*, &c. And on this Plea the Defendant's Counſel did demur in Law. And on great Deliberation Judgment was given by *Popham* Chief Juſtice and the whole Court againſt the Plaintiff: And the Reaſon and Cauſe of the Judgment was, That where a Condition of a Bond conſiſts on two Parts in the *(a)* Disjunctive, and both are poſſible at the Time of the Bond made, and afterwards one of them becomes impoſſible by the Act of God, the Obligor is not bound to perform the other Part: For the Condition is made for the Benefit of the Obligor, and ſhall be taken beneficially for him, and he hath Election to perform the one or the other for the Saving of the Penalty of his Bond: And when one Part is become impoſſible by the Act of God, it is as beneficial for him as if that Part of the Disjunctive which is become impoſſible had been only the Condition of the Bond: And ſo when one became *(b)* impoſſible by the Act of God, which by no Induſtry he could perform, his Bond is ſaved, although he doth not perform the other, *quia (c) impotentia excuſat legem.* And in this Caſe at Bar, for as much as *Jane* died before the ſaid *Ramsford*, ſo that he could not leave to the ſaid *Jane*, either as Executrix, or by Legacy, or other Aſſurance, ſo much Mony as ſhould be received by him, *&c.* and ſo this Part of the Disjunctive became impoſſible by the Act of God. *Vide (d)* 30 *H.* 6. *Barre* 60. *(e)* 15 *H.* 7. 4. 9 *Eliz. Dier (f)* 162. between *Arundel* and *Combe* And the Caſe in *(g)* 21 *E.* 3. 29. *b.* is not like this Caſe. For there at the Time of the Bond made, and at the Time when the Condition was to be performed, one Part of the Disjunctive was not poſſible to be performed, for there the Heir of his Body was not *in rerum natura.*

(a) 1 Rol. 447, 450. 4 Co. 52. b. 1 Mod. Rep. 264, 265. Cr. El. 396, 397, 539. 10 Co. 127. Poph. 98. O Benl. 8. pl. 31. Goldsb. 142. Moor 395, 396. Co. Lit. 225. a. Lutw. 693. 2 Mod. 200.

(b) 1 Jones 171, 172, 179, 139, 180, 181, Palm. 514, 515, 549, 552, 553, 554, 555, 556, 557, 558. Dyer 231. pl. 4. Co. Lit 206. a. b, Cr. El. 864. Yelv. 138, 139. 1 Brownl. 104, 105. 1 Rol. 419, 420.

(c) Co. Lit. 29. a. 1 Co. 98. a. Hardres 387. Co. Lit. 206. a. Plowd. 289. a.

4 Co. 11. a. 6 Co. 21. b. 68. a. 8 Co. 172. b. 9 Co. 73. a. 10 Co. 139. b.
(d) 31 H. 6. Fitz. Bar. 60. (e) 15 H. 7. 13. a. (f) Dyer 262. pl. 30. Cr. El. 398. Moor 432. Palm. 549. (g) Poſtea 112. a. 1 Rol. 450. Br. Condition 47. Bridg. 40.

Trin. 38 Eliz. *Rot.* 1734.

In the Common Pleas.

HALLING's *Case.*

Owen. 157. Cr. El. 517. Poph. 199. Allein 25. Godb. 445. 1 Anderſ. 300. 2 Rol. Rep. 466. Cart. 205. Kelw. 53. a. Moor 22, 454, 457, 458. Co. Ent. 132. pl. 15.

BEtween *Halling* and *Convard* in Debt on Bond for Performance of Covenants, it was adjudged, That where the Covenant was, That he ſhould make an Eſtate in Fee before ſuch Feaſt at the Coſts of the Covenantee, that the Covenantor ought to do the firſt Act, *ſcil.* notify to the Covenantee what Manner of Eſtate he would have, ſo that the Covenantee might know what Sum of Mony to tender: And it was ſaid, 'twas all one when the Covenant was general, and when it was particular: As to make a Feoffment, the Covenantor ought to do the firſt Act, *ſcil.* ſhew what Manner of Feoffment he would make, either by Deed-Poll, or by Indenture, *&c.* So in the principal Caſe, if nothing be done before the Day, the Covenant is broke, becauſe the Covenantor ought to have done the firſt Act, and ſo the Default is in him.

Hill. 39 Eliz.

In the Common Pleas.

MATHEWSON's *Case.*

Cr. El. 468, 470, 471. 2 Rol. 30, 149.

BEtween *Mathewſon* and others Pl. and *Lydiate* Def. the Caſe was ſuch; A Charter-party indented between the Maſter and the Owner of a Ship of the one Part, and *George Lydiate* and ſix other Merchants of the other Part. By which the Maſter and Owner covenant with the Merchants to ſhip certain Merchandizes

Merchandizes at ſuch a Port beyond Sea, and to tranſport them to the City of *London*, for which each of the Merchants covenants *ſeparatim* with the Maſter and Owner, that one Merchant ſhall pay 3 *l.* another 3 *l.* &c. *& ſic de cæteris.* And the Words of the Covenant are, *conveniunt ſeparatim*, &c. and in the End is this Clauſe, *Et ad* (a) *performationem omnium & ſingulorum conventionum ex parte præd' Mercatorum perimplend', quilibet Mercatorum præd' ſeparatim obligat ſeipſum præfat' Magiſtro & proprietariis*, in double the Fraight. And now on one of the ſeveral Covenants an Action of Debt was brought againſt *Lydiate* one of the Merchants on the ſaid Indenture. To which the Defendant (b) pleaded, That the Seal of another of the Merchants fixed to the ſaid Indenture was broke from the Deed; upon which the Plaintiff did demur in Law. And in this Caſe it was reſolved:

(a) 2 Rol. 149.

(b) Cr. El. 408.

1. That although the Merchants join in Covenant, *ſcil. conveniunt* (c) *ſeparatim*, yet this Word, *ſeparatim*, makes it ſeveral Covenants, and not a joint Covenant. Alſo the ſaid later Clauſe, *ad performationem omnium & ſingulorum*, &c. is in Law ſeveral, by Reaſon of this Word *ſeparatim*; and this Word ſhall be referred to the ſeveral Covenants before.

(c) 2 Rol. 149. Cr. El. 546.

2. It was reſolved, That although the Covenants on the Part of the Maſter and Owner were joint, yet the Covenants on the Part of the Merchants ſtood ſeveral; and for this Cauſe if (d) the Seal of one of the Merchants be broke from the Deed, it ſhould not avoid the Deed, but only againſt him: But if any of the (e) Seals of the Maſter or Owners had been broke from the Deed all their Covenants had been defeated. And if the Deed had been raſed in the Date after the Delivery, it had gone to the whole. But when the Covenants are ſeveral, they are as ſeveral Deeds wrote in one and the ſame Piece (f) of Parchment. And Judgment was given accordingly. *Vide* (g) 3 *H.* 7. 14 *H.* 8. 25. 30 *E.* 3. 31. 32 *in Aſſ.* 47 *E.* 3. 3. *in Debt per* Finchden, 39 *H.* 8. 36.

(d) 11 Co. 28. b. 1 Rol. Rep. 40. Cr El. 576. 2 Rol. 30. Doct. placit. 260, 262, 263.

(e) 2 Rol. 30. Doct. placit. 260, 262, 263. Cr. El. 546. Poph. 161. March 125. 2 Show. 28. 2 Lev. 220.

(f) Cr. El. 546.

(g) 11 Co. 28. b. Cr. El. 408. 3 H. 7. 5. 2. 2 Rol. 30. Br. obligation 43. Fitz. Bar. 46.

Trin.

Trin. 41 Eliz. *Rot.* 3252.

In the Common Pleas.

LAMB's *Case.*

Co. Ent. 129. pl. 13. Cr. El. 716, 864. Moor 645. (*a*) 1 Mod. Rep. 104, 265. 3 Bulſtr. 30. 1 Rol. 452. 6 Co. 31. a. 1 Rol. Rep. 196. Co. Lit. 209. a. 2 Mod. 200. Lutw. 694. (*b*) 2 Jones 96. Cart. 205. 1 Vent. 255. 1 Rol. 458. (*c*) Br. covenant 3. Co. Lit. 209. a. 33 H. 6. 16. b. 17. a. Fitz. Bar. 62. Br. condition 13. 2 Co. 3. b. 1 Rol. Rep. 196. 3 Bulſtr. 29, 30. (*d*) 2 Co. 3. b. (*e*) Perk. ſect. 775. Fitz. Det. 81.

IN Debt on a Bond by *Lamb* Executor of *D.* againſt *Brownwent*, with Condition, " That if the Defendant " ſhall in the Term of S. *Michael* next, in the Prerogative " Court of the Archbiſhop of *Canterbury* give unto the ſaid " *D.* his Executors or Aſſigns, ſuch ſufficient Releaſe and " Diſcharge, *&c.* as by the Judge of the ſaid Court ſhall be " thought meet, that then, *&c.* The Defendant ſhewed, that Doctor *Lewyn* was Judge of the Court, & *quod idem Judex nec deviſavit, nec appunctavit aliquam relaxationem, ſeu exonerationem*, &c. *ſecundum formam*, &c. upon which the Plaintiff did demur in Law. And it was adjudged for the Plaintiff; For in as much as the Judge was (*a*) a Stranger to the Condition, and the Condition is for the Benefit of the Obligor, and the Performance thereof ſhall ſave his Bond, he hath taken upon him to perform it at his Peril; and therefore he ought not only to have done the (*b*) firſt Act, but ought alſo to have procured the Judge to have deviſed and directed it. Otherwiſe it is, if the Obligee himſelf or his Council ſhould deviſe. *Vide* (*c*) 33 *H.* 6. 16. *b.* adjudged accordingly, (*d*) 36 *H.* 6. 8. *b.* 32 *E.* 3. *Barre* 264. *b.* 2 *E.* 4. 2. 8 *E.* 4. 2. 15 *E.* 4. 5. *b.* 22 *E.* 4. 43. *b.* 9 *H.* 7. 17. *&c. vide* 7 (*e*) *E.* 4. 13. *b.* it was ſaid, If a Man be bound to make to a Man a ſure, ſufficient, and lawful Eſtate in certain Lands by the Advice of *J. D.* if he make an Eſtate to him according to the Deviſe of *J. D.* be it ſufficient or not, lawful or not lawful, yet his Bond is ſaved.

Mich.

Mich. 42 & 43 Eliz.

In the King's Bench.

BROUGHTON'S *Caſe.*

IN Debt in the *Common Pleas* by *Broughton* againſt *Pretty* on a Bond, the Condition was; That where the Plaintiff was bound in a Bond of 200 *l.* for the Defendant, for the Payment of 100 *l.* to *A. B.* " If therefore the Defendant " ſhould ſave and keep harmleſs the Plaintiff for all Suits, " Quarrels, and Demands touching and concerning the ſaid " Bond of 200 *l.* That then this Obligation to be void, At the Day of Payment of the 100 *l.* the Plaintiff came to the Place where the 100 *l.* ought to be paid, and perceiving no Perſon there preſent to pay the 100 *l.* for the Defendant, he to ſave the Penalty of his Bond paid the 100 *l.* to *A. B.* and now brought this Action on his Counter-Bond; and on *Non fuit damnificatus* pleaded, the Plaintiff replied, and ſhewed all the ſaid ſpecial Matter; and thereupon the Defendant demurr'd; And it was adjudged that the Plaintiff ſhould recover, for the Payment of the 100 *l.* is (*a*) a Damage and Harm, and if he had not paid it, a greater Harm would have followed: And it is not neceſſary that the Plaintiff be arreſted, or ſued, *&c.* Alſo it was ſaid, That this Plea, *Non fuit* (*b*) *damnificatus* implied that the Defendant had ſaved him harmleſs, as by Releaſe, Payment, or otherwiſe. *Vide* 18 *E.* 4. 27. *b.* by *Brian* and *Littleton*, Terror of Suit, ſo that he dare not go about his Buſineſs, is a Damnification, although he be not arreſted by Force of Proceſs.

(*a*) 1 Vent. 36, 261. 1 Jones 329, 330. 2 Bulſtr. 94. Cr. El. 53, 264, 369. 1 Rol. 432. Owen 19. Cr. Car. 349, 350. Cr. Jac. 288, 340. Dyer 187. pl. 4. Yelv. 207. 3 Bulſtr. 234.

(*b*) Doctrin placit. 270.

(*c*) Cr. Jac. 340. 1 Rol. 432. 2 Bulſtr. 94, 105. 3 Bulſtr. 234. 18 E. 4. 27. b. 28. a. Br. condition 165.

Mich. 43 & 44 Eliz.

In the King's Bench.

The Dean and Chapter of WINDSOR'S *Caſe.*

IN the *King's Bench*, between the Dean and Chapter of *Windſor* and *Hyde*, the Caſe was ſuch; A Man demiſed a Houſe by Indenture for Years; the Leſſee for him and his Executors covenanted and granted with the Leſſor to repair the Houſe at all Times neceſſary, The Leſſee aſſigned it over to *Hyde*, who ſuffered it to decay; the Leſſor brought an Action

Cr. El. 457, 552, 553. 1 Rol. 521. Moor 399, 400.

ction of Covenant againſt the Aſſignee. And it was adjudged by *Popham* Chief Juſtice, and the whole Court, that the Action of Covenant did lie, although the Leſſee had not covenanted for him and his Aſſigns; and (*a*) ſuch Covenant which extends to the Support of the Thing demiſed is *quodammodo* appurtenant to it, and goes with it. And in Reſpect the Leſſee hath taken upon him to bear the Charges of the Reparations, the Yearly Rent was the leſs, which goes to the Benefit of the Aſſignee, & (*b*) *qui ſentit commodum ſentire debet & onus.* If a Man grants to one (*c*) Eſtovers to repair his Houſe, it is appurtenant to his Houſe. *F. N. B.* 181. 28 *H.* 8. (*d*) 28. If the Leſſee covenants to diſcharge the Leſſor *de omnibus oneribus ordinariis & extraordinariis*, and to repair the Houſes, an Action lies againſt the Aſſignee.

(*a*) Moor 27, 399. Cr. El. 457, 552, 553. 1 Rol. 521, 522. 1 Sand. 239. Cr. Jac. 125. 1 Sid. 147. Cr. Car. 222, 523. 1 Jones 245. 1 Anderſ. 82. Antea 16. a. b. 17. b.

(*b*) Poſtea 100. a. 1 Co. 99. a. 7 Co. 38. b. Co. Lit. 231. a.

(*d*) Dyer 27. pl. 2 Inſt. 489. Carter 142. 3 Keb. 592. (*c*) Ant. 17. b. F. N. B. 181. N. 172, 173, &c.

Paſch. 43 Eliz.

In the King's Bench.

Sir THOMAS PALMER's *Caſe.*

Co. Ent. 36. pl. 29. Cr. El. 819, 820. 2 Rol. 699. Noy 32. Moor 692, 691.

IN an Action on the Caſe between *Baſſet* and *Maynard*, on the general Iſſue the Jurors gave a ſpecial Verdict to this Effect; Sir *Thomas Palmer* was ſeiſed in Fee of a great Wood, and bargained and ſold to one *Cornford* and his Aſſigns 600 Cords of Wood to be taken by the Aſſignment of Sir *Thomas*; *Cornford* aſſigned his Intereſt to the Plaintiff, and afterwards the ſaid Sir *Thomas* ſold to the Defendant ſuch Quantity of Wood as would make 4000 Cords, to be taken within the ſaid great Wood, at the Election of the Vendee. And afterwards Sir *Thomas* aſſigned to the Plaintiff 600 Cords of Wood to be taken by him, who felled them; and the Defendant took and converted them, *&c.* And Judgment was given for the Plaintiff. And in this Caſe two Points were reſolved:

(*a*) Goldſb. 184. 1 Rol. Rep. 99. 2 Rol. 47. (*b*) Winch 29. Cr. El. 820. 1 Rol. 725. 1 Jones 276. Cr. Jac. 481.

1. That *Cornford* had an Intereſt which he might (*a*) aſſign over, and not a Thing in Action, or a Poſſibility; For it was reſolved, That if Sir *Tho.* did not aſſign them to *Cornford* on Requeſt, *Cornford* might take them without (*b*) Aſſignm. for the Grantor cannot by his own Act, or Default, either ſubver-

vert, or derogate from his Grant; then it follows that he had an Intereſt which he might aſſign over. *Vide* 44 *E.* 3. 43. *b.* where the (*a*) Prior of *Letton* ſeiſed of a Wood called *Hoſley*, by Deed by Aſſent of his Covent ſold the ſaid Wood to one *Barth. Wilby* to be felled and carried away within two Years next following (except 40 of the beſt Oaks to be taken at the Election of the Prior) the Vendee for Shortneſs of Time upon the End of the Covenant requeſted the Prior to come and chuſe his Oaks, and he would not come, wherefore the Vendee ſuffered 40 of the beſt Oaks to ſtand, and the others he felled. And there Iſſue was taken on the Requeſt: Which Caſe is not well abridg'd by *Brook*, Tit. *Reſervation* 3. for there he has omitted the Requeſt; But *Fitz.* Tit. *Barre* 204. hath truly abridged it. Take heed, Reader, of all (*b*) Abridgments, for the chief Uſe of them is as of Tables to find the Book at large. But I exhort every good Student to read and rely only on the Books at large, as in another Place I have adviſed. And with this Reſolution agreeth the Book in 8 *E.* 3. 5. & 54. *b.* where the Caſe was; *J.* had a Houſe and a Carve of Land, and he had reaſonable (*c*) Eſtovers in the Wood of another by View and Delivery of the Baily, &c. If he takes Eſtovers without View or Livery, he is a Treſpaſſer, although he takes leſſer than he ought to have by his Delivery: But if *J.* demands his Eſtovers, and the Owner of the Wood or his Baily will not deliver them to him, *J.* may have an Aſſiſe. *Vide* 5 *E.* 3. 64. *b.* & 65. *a.*

(*a*) Cr. El. 820. Hob. 174. 44 E 3. 43. b. Fitz. Bar. 204. Br. Reſervat. 3. Br. Relat. 4.

(*b*) 10 Co. 41. a. 117. b. Præf. 4 Rep.

(*c*) 2 Inſt. 411.

2. It was reſolved, That admitting the Aſſignment to the Plaintiff to be void, yet after that the Trees are felled, the Defendant (*d*) could not take them: As if I grant 1000 Cords of Wood to one to be taken at the Election of the Grantee; the Grantor or Stranger fells ſome Trees, the Grantee cannot take them, but ought to ſupply his Grant out of the (*e*) Reſidue.

(*d*) 3 Keb. 493. Cr. El. 820. Palm. 212. 1 Brownl. 220. Yelv. 188.

(*e*) 1 Vent. 271. 1 Bulſt. 94.

Trin. 2 Jac.

In the King's Bench.

The Counteſs of RUTLAND'S *Caſe.*

Moor 723, 724, 725. Cr. Jac. 29.

Iſabel Counteſs of *Rutland* brought an Action of Treſpaſs againſt *Roger* Earl of *Rutland* for breaking her Houſe and Cloſe, called *Eykering* Houſe, and *Lady* Park, at *Eykering* in the County of *Nottingham*: The Defendant pleaded Not Guilty; and now this Term on Evidence to a ſubſtantial Jury at the *King's Bench* Bar, the Caſe on the Evidence was ſuch; *Edward* Earl of *Rutland* was ſeiſed in Fee of the Manor of *Eykering*, whereof the Houſe and Cloſe in which, *&c.* were Parcel, and by Indenture bearing Date 10 *Martii*, 21 *Eliz.* for the Augmentation of the Jointure of the ſaid Counteſs, then his Wife, covenanted with Sir *Gilbert Gerrard*, Knight, and *Tho. Holcroſt*, Eſq; his Brother, that he before the End of *Trinity* Term then next following, would aſſure by Fine, or other Conveyance the ſaid Manor to the ſaid Sir *Gilbert* and *Thomas* in Fee, which Fine or other Conveyance of the ſaid Manor of *Eykering* ſhould be to the Uſe of the ſaid Earl and the ſaid *Iſabel* his Wife, and the Heirs of the ſaid Earl, which Indenture the ſaid Earl acknowledged before a Maſter of the Chancery, the 28*th* Day of the ſame Month, and the ſame Day it was inrolled; and the next Day, *ſcil.* the 29*th* Day of *March* by another Indenture between the ſaid Earl of the one Part, and the Lord *Burghley*, Sir *Gilbert Gerrard* and others, of the other Part, for the Advancement of thoſe who ſhould ſucceed him in the Earldom; and for the Advancement of the Heirs Males of the Body of *Thomas* Earl of *Rutland* his Grandfather, covenanted with the Lord *Burghley*, Sir *Gilbert Gerrard* and others to convey the ſaid Manor of *Eyker'* amongſt others to the ſaid Ld. *Burgh.* Sir *Gilb. Gerrard* and others, or to ſome or one of them before the Feaſt of the Annunciation of our Lady next following, which Aſſurance ſhould be to the Uſe of the ſaid Earl *Edw.* and to the Heirs Males

Note, Sir Gilb. was Party to both the Indentures.

Males of his Body, and for Default of ſuch Iſſue to the Uſe of the Heirs Males of the Body of the ſaid *Thomas* Earl of *Rutland* with divers Rem'rs over. And afterwards the ſaid *Edward* Earl of *Rutland*, by the ſaid later Indenture, covenanted and granted with the Parties thereto, That if the ſaid Earl *Edw.* ſhould not convey ſufficiently the ſaid Manor amongſt others as is aforeſaid, before the ſaid Feaſt of the Annunciation of our Lady, that then the ſaid Earl *Edw.* and his Heirs would ſtand ſeiſed of the ſaid Manor of *E.* to the ſaid Uſes contained in the ſecond Indenture. No Fine or other Aſſurance was levied or made by the ſaid Earl *Edw.* before the End of *Trin.* Term: And afterwards, *ſcil.* 17 *Sept.* next following, the ſaid Earl acknowledged a Note of a Fine of the Manor of *E.* only to Sir *Gilbert Gerrard* and *Thomas Holcroft*, and to the Heirs of Sir *Gilbert*; and the 18th Day of the ſame Month acknowledged another Note of a Fine of the ſaid Manor of *E.* amongſt many other Manors mentioned in the laſt Indenture to the Lord *Burghley*, Sir *Gilb. Gerrard* and others, Parties to the laſt Indenture, and to the Heirs of the Ld. *Burghley*; and both were entered in *Octab. Michaelis* then next following. And it was proved by divers Witneſſes, That the ſaid Earl *Edw.* as well before the Indentures as after the Fine levied, told them, That the ſaid Counteſs ſhould have the Manor of *E.* for her Jointure.

And in this Caſe four Points were reſolved by Sir *John Popham* Chief Juſtice, and the whole Court.

1. Altho' the Indentures being made for declaring of the Uſes of a ſubſequent Fine, Recovery, or other Aſſurance, to certain Perſons, and within a certain Time, and to certain Uſes, are but directory, and do not bind the Eſtate or Intereſt of the Land; yet if the Fine, Recovery, or other Aſſurance be purſued according to the Indentures, there could not be any bare (*a*) Averment againſt the Indentures taken in ſuch Caſe, that after the making of the Indentures, and before the Aſſurance by mutual Agreement of the Parties it was concluded and agreed that the Aſſurance ſhould be to other Uſes: But if other Agreement or Limitation of Uſes be made by Writing, or by other Matter as high or higher, then the laſt Agreement ſhall ſtand; for every Contract or Agreement ought to be diſſolved by Matter of as high a Nature as the firſt Deed, (*b*) *Nihil tam conveniens eſt naturali æquitati, unumquodque diſſolvi eo ligamine, quo ligatum eſt.* Alſo it would be inconvenient, that Matters in Writing made by Advice and on Conſiderat. and which finally import the certain Truth of the Agreem. of the Parties ſhould be controlled by Averment of the Parties to be proved by the incertain

(*a*) 2 Co. 76. a. 9 Co. 10. b. 3 Bulſt. 251, 257. Palm. 507. Cr. Jac. 29. 2 Anderſ. 46, 47. 2 Rol. Rep. 39. Winch, 119.

(*b*) Bract. lib. 2. f. 28. 1 Brown. 191. 2 Co. 53. a. 4 Co. 57. b. 6 Co. 43. b. 2 Inſt. 359, 673. Davis 33. b.

Teſtimony of ſlippery Memory. And it would be dangerous to Purchaſers and Farmers, and all others in ſuch Caſes, if ſuch nude Averments againſt Matter in Writing ſhould be admitted.

Cr. Jac. 29. Poſt. 68. b. 1 Co. 176. a. 2 Co. 76. a. 7 Co. 39. a. b. 2 And. 46, 47.

2. It was reſolved, That if the Form of the Indentures be not purſued, as for the Quantity of the Land, or the Time within which, *&c.* in theſe Caſes, and other like, where the Indentures be not purſued, Averment without Writing might be taken, That the Fine, Recovery, or other Aſſurance was to another Uſe or Intent than is contained in the Indenture: For inaſmuch as the Indentures are not purſued, it is reaſonable that the Parties ſhould be admitted to ſhew the Cauſe and Reaſon why they were not purſued by Reaſon of the new Argument ſubſequent, which in ſuch Caſe might be as well by Word as by Writing.

Cr. Jac. 512.

3. It was reſolved, That although the Indentures are not purſuant in Circumſtance of Time, Quantity, Perſon, and the like, yet if no other new Agreement can be proved, the Aſſurance ſhould be in Judgment of Law to the Uſe contained in the Indentures.

4. That in the principal Caſe the Fines could not be directed by both the Indentures, that is to ſay, by the firſt Indenture to the Uſe of the Earl *Edward* and *Iſabel* his Wife for their Lives; and by the ſecond Indenture to the Earl and the Heirs Males of his Body with the Remainders over, limited by the ſecond Indenture, and ſo the Fines to work on both the Indentures (although peradventure ſuch was the Intent of the Parties) and that for three Reaſons:

Bridgm. 113.

1. The Directions and Declarations of the firſt Indentures were controlled and fruſtrated by the ſecond Indentures, and therefore the Fines could not be directed by both.

2. The Indentures import ſeveral diſtinct and divers Contracts and Eſtates, that is to ſay, one to the Earl and *Iſabel* his Wife, and to the Heirs of the Earl, the other to the Earl only, and to his Heirs Males of his Body, with divers Remainders over; ſo that the Fines ought for the Manor of *Eyker'* to be directed, either wholly by the firſt, or wholly by the ſecond, without any Fraction or Diviſion of Eſtates.

3. It would be againſt the Words and Intent of both the Indentures, to make a Hotchpotch and Commixture of both, which by their Creation were ſeveral and diſtinct in Time, in Perſons and Eſtates.

Caſes

Cases of Executors.

Hill. 26 Eliz.

In the King's Bench.

RUSSEL's *Case.*

EDward *Russel* as Executor of *William Russel* brought an Action on the Case against *Thomas Prat* and *Margery* his Wife; and declared, that *William Russel* was possessed of a Chest with divers Jewels, Goods, and Sums of Money (and declared what in certain) in it, and that the said *William* lost them, and that they came to the Hands of *Margery dum sola fuit*, that is to say, *6 Jan.* 1 *Eliz.* And afterwards the Testator died, & *quod præd' Margeria dum sola fuit*, did convert the Goods to her own Use, &c. The Defendants pleaded in Bar a Release of the Plaintiff made to them, &c. To which the Plaintiff said, That at the Time of the Release made, he was within the Age of 21 Years, &c. on which the Defendants did demur in Law. And the great Question (which was often argued at the Bar and Bench) was, Whether the Release of an Infant Executor having proved the Will should bar him or not. And it was argued that the said Release should bar him for divers Reasons.

1 And. 177, 178
1 Leon. 193.
Moor 146.
Poph. 190, 191.
1 Jones 174.

1. Because the Executor represents the Person of the Testator, and all that which he doth is in the Right (and as in the Person) of the Testator, and not in his own Right; and therefore his Infancy is not to be respected.

2. The Law which enables him to take on him the Charge of the Will, and to prove it, and to bring Actions, and to do Things which belong to the Office of an Executor, the same Law enables him to make Releases and Acquittances without any Regard to his Nonage. As the (*a*) King shall not avoid Leases or Grants in Respect of the Infancy of his natural Capacity; nor the Mayor, Bailiff, or the Head of any other

(*a*) 1 Rol. 728. a. 26 Ass. 54. Co. Lit. 43. a. Fitz. infant. 15. Br. Age 34. 7 Co. 12. a. Caloin's Case. Plowd. 213. a. 221. a. 364. b.

other Corporation shall not avoid any of their Deeds or Grants, for the Infancy of their natural Capacity, because they do them in another Right and Capacity.

3. It would be inconvenient that an Infant Executor shall compel the Debtors of his Testator to pay the Debts to him, and that he shall not have Power to acquit or discharge them.

(a) Cr. Car. 490.

4. They cited divers Books in the Point, 16 *H.* (a) 6. *Releases* 45. the Opinion of the whole Court, that a Release made by an (b) Infant within Age, as an Executor, is good, and he cannot avoid it. And the same Law is of a Release made by a Feme-covert Executrix; and so the Release of the Husband is nought worth, as there it is said, 18 *H.* 6. 4. of a Feme-covert, and 18 *E.* 4. 10. of a Feme-covert, 21 *E.* 4. 13. & 24. of an Infant and Feme-covert, and 16 *H.* 7. 6. But on great Deliberation, and on Conference had with *Anderson* Chief Justice of the *Common Pleas*, *Manwood* and others, Justices, it was resolved by Sir *Christopher Wray* Chief Justice, Sir *Thomas Gawdy*, and the whole Court of *King's Bench*, that the (b) Release was no Bar, and principally for 3 Reasons.

(b) Moor 146. Cr. El. 43, 671. 1 And. 177. pl. 338, 164. Swinb. 288. Co. Lit. 172. a. 4 Leon. 102. 1 Jones 420. 1 Rol. 730. Cr. Car. 490, 491. 1 Rol. Rep. 366. 1 Brownl. 120. Cr. El. 43, 671. Godb. 29.

1. Because if it should be a Bar it would be a *Devastavit*, and charge the Infant of his own proper Goods.

2. It would do a Wrong, which an Infant by his Release can never do.

(c) Cr. El. 254. Cr. Jac. 441. Co. Lit. 172. a. 1 And. 117, 177, 178. 1 Rol. Rep. 366. 1 Brownl. 120.

3. In making of this Release he doth not pursue his Office, nor perform the Duty of an Ex'or: And therefore it was well agreed, That all things which he doth (c) according to the Office and Duty of an Ex'or should bind him: But Things which he doth against the Office of an Ex'or should not bind him, forasmuch as he is within Age. The Office of an Ex'or (as appears in 20 *H.* 7. 5. *a.*) is to do his Office (d) truly, diligently and lawfully, and all these he breaks when he wastes the Goods of the Dead: But it was resolved, that on Payment or Satisfaction to an Infant Executor, he might acquit and discharge the Debtor for as much as he receives: But it was resolved, That a Monk Ex'or might release without Satisfaction, for his Profession would be no Impediment to the Release, 21 *E.* 4. 13. *b.* And as to the said Book of (e) 16 *H.* 6. in the said Case of the Infant, it was to be intended when the Infant receives full Satisfaction; for the Book saith, The Deed of an Infant as Ex'or; and he doth not as Ex'or when he releases, and receives nothing. But the Opinion there as to the Feme (f) Covert Ex'trix, was utterly denied, for altho' she be Ex'ix, yet she can do nothing to the Prejudice of her Husband: But without Question in such Case the Release of the Husband is good. And so the Doubts in the Books of 13 *E.* 1. *Ex'ors* 119. 5 *E.* 3. 45. *Barbor's* Case, 18 *H.* 6. 4. & 18 *E.* 4. 10. 21 *E.* 4. 13. & 24. 2 *H.* 7. 15. 6 *H.* 7. 6. 7 *H.* 7. 13 & 14. are well explain'd. And afterwards on a Writ of Enquiry of Damages returned after the Stat. of (g) 27 *El. cap.* 8. Judgment was given for the Plaintiff;

(d) 8 Co. 133. a. 20 H. 7. 5. a.

(e) 16 H. 6. Release 45. Cr. Car. 490.

(f) 1 And. 117. Kelw. 122. a. b. Cr. Car. 519. 3 Sid. 188.

(g) 1 Leon. 193. 194. Moor 146.

And

And on the said Act a Writ of Error was brought in the Exchequer-Chamber, where it was unanimously agreed That the said Release was no Bar. And so this Point was resolved by all the Judges of *England*: But divers other Errors were assigned and moved as well in the Declaration, as that the Plea was discontinued; and afterwards the Parties agreed, and for Error in the Proceeding the Judgment was reversed. And note, good Reader, by these Resolutions you will better understand the said Books before cited, & *alios ejusdem farinæ*. And Sir *Thomas Gawdy* said in this Case, that an Executor might well (*a*) release any Action before Probate, for altho' he could not have an (*b*) Action, yet the Interest of the Action is in him (*c*) 21 *E.* 4. 24. *a. acc.*

(*a*) Plow. 278. b. 281. a. infra in Middleton's Case. 9 Co. 39. a. Raym. 481. 1 Rol. 917. A. 1. Co. Lit. 292. b. Hutt. 31. 10 Co. 52. a.
(*b*) Plow. 278. b. 280. b. 281. a. 7 H. 4. 18. infra in Middleton's Case. Fitz. Executors 107. Br. Execut. 49. 9 Co. 39. a. Wentworth 51. Case. 3 Lev. 59.

Raym. 481. 1 Rol. 917. A. 2. Co. Lit. 292 b. Hutt. 31. 10 Co. 52. a. Perk. Sect. 482. (*c*) Dy. 135. pl. 13. (*d*) Br. Execut. 117. intr. in Middleton's 2 Show. 25. Salk. 302.

Pasch. 1 Jac.

In the Common Pleas.

MIDDLETON's *Case.*

IT was adjudged in the *Common Pleas* between *Middleton* and *Rimot*, That an Ex'or before Probate might (*a*) release an Action, although before Probate he could not (*b*) have an Action, for the (*c*) Right of the Action is in him; but if *A.* releases and afterwards takes (*d*) Administration, it should not bar him, for the Right of the Action was not in him at the Time of the Release. *Vide* (*e*) 18 *H.* 6. 43. *b. Greisbrook's* Case, *Plow. Com.* 277, 278. (*f*) 21 *E.* 4. 24. *a.* Two Executors prove the Will, the third refuses, yet he may release, (*g*) *Lit.* 177. If a Man be bound to pay a Sum at a Day to come, a Release of all Actions before the Day bars it, yet before the Day he cannot have an Action of Debt, and so the Opinion of Sir *Thomas Gawdy* in the Case before was now adjudged.

(*a*) Plow. 278. b. 281. a. supra in Russel's Case. 9 Co. 39. a. Raym. 481. 1 Rol. 917. a. 1. Co. Lit. 292. b. Hutt. 31. 10 Co. 52. a.
(*b*) Plow. 278. b. 280. b. 281. a. 7 H. 4. 18. a. supra in Russel's Case. Fitz. Executors 107. Br. Executors 49. 9 Co. 39. a. 10 Co. 52. a.
(*c*) Dyer 135. Executors 1 [illegible]

Raym. 481. 1 Rol. 917. a. 2. Co. Lit. 292. b. Went. 51. Perk sect. 482. pl. 13. (*d*) Moor 119, 126. Swinb. 281. (*e*) 18 H. 6. 23. b. (*f*) Br. supra in Russel's Case. (*g*) Lit. sect. 512. f. 118. b. Co. Lit. 292. a. b.

Hill. 40 Eliz. *Rot.* 119.

In the Common Pleas.

HARRISON's *Case.*

Co. Ent. 146. pl. 25. Jenk. Cent. 274. Bridgm. 80.

RObert Green brought an Action of Debt on a Bond of 40 *l.* againſt *William Harriſon* Adminiſtrator of the Goods and Chattels of *Thomas Sidney:* The Defendant pleaded, that the Inteſtate was bound in a Bond in the Nature of a Statute-Staple, beyond which he had no Goods, *&c.* The Plaintiff replied, that there were Indentures of Defeaſance made to perform Covenants in certain Indentures, which were all performed hitherto; upon which the Defendant demurred. And it was adjudg'd that the Plaintiff ſhould recover; for a Debt due by Bond ſhall be paid before a Statute made to perform Covenants, when none of them then were, nor perhaps ever would be broken, but are Things in Contingency, and *in futuro*; and therefore ſuch Poſſibility which peradventure may never happen, ſhall not bar preſent and due Debts by Bond or other Specialties. And if ſuch Statutes to perform Covenants ſhould bar others of their due Debts, little or no Debts would be paid. *Et nota bene*, that it was adjudged in the *King's Bench* by *Popham* Chief Juſtice, and the whole Court, *Hill.* 42 *Eliz.* that if a Man recover Debt by Judgment in the King's Court, this Judgment ſhall be paid before Bonds in the Nature of a (*b*) Statute Staple or Merchant; for Judgment given in the King's Court is higher than ſuch Statutes which are private Records, and portable by the Conuſee in his Pocket. But Judgments given in the King's Court on ordinary and judicial Proceedings, which remain in the Cuſtody of a ſworn Officer, are Records which are preferred in Law before ſuch Statutes. And the Law preſumes, *quod judicium redditur in invitum*; and ſuch Judgments ſhall be paid before Recognizances acknowledged by the Aſſent of the Parties in any of the King's Courts, which may be acknowledged in a private Manner; and it is not material whether the Judgm. or Recognizance, or Stat. be firſt; but be the Judgment firſt or

(*a*) 1 Rol. 925. Bridgm. 80, 122. 2 Leon. 212. 1 Rol. Rep. 405. Moor 752. Jenk. Cent. 274. Cr. Jac. 9, 35, 102, 182. 1 Bulſt. 101. Cr. Car. 363. Cr. El. 467. Stiles 55. 9 Co. 108. b. Swinb. 370. Owen 72.

(*b*) 4 Co. 59. b. 60. a. Cr. El. 375, 714, 735, 822. 2 And. 160. 1 Brownl. 101. 1 Rol. 926. Yelv. 29, 133. 6 Co. 45. b. Swinb. 369, 270.

36 H. 6. 6. a.

or last, it ought to be first satisfied. And so it was held by the whole Court of *Common Pleas*, between (*a*) *Pemberton* and *Bartram*, *Pasch.* 32 *Eliz. Rot.* 235. which see before in the End of the *Sadlers* Case, in the fourth Part of my Reports.

(*a*) Swinb. 369, 370. 4 Co. 59. b.

Hill. 40 Eliz.

In the Common Pleas.

PIGGOT's *Case.*

PIggot Administrator of *Longfield durante minore ætate* of *A. Longfield* brought an Action of Debt in the *Common Pleas* on a Bond against *Gascoigne* and *Furthee*; And (*a*) averred that *A. Longfield* was within the Age of 21 Years; To which the Defendants pleaded an insufficient Bar; on which the Plaintiff demurr'd. And for as much as the Bar was insufficient, now the Question was, whether the Declaration were good or not. And the Doubt was, When Administration is granted *durante minore ætate*, how long it should endure, *scil.* to the Age of 21 Years, or to what Age it should continue. And thereupon the Court confer'd with sundry Doctors of the Civil Law openly in Court. And it was held by them, That Administration *durante minore ætate* should cease at the Age of (*b*) 17 Years; and if such Administration be committed, the Executor being of the Age of 17 Years it is void: And for this Cause it was adjudged by the Court, that the Declaration was insufficient; for perhaps the Executor was of the Age of 17, or 18, &c. and within the Age of 21 Years as the Pl. hath averred; and yet the Plaintiff's Administration was determined; for which Cause it was awarded, that the Plaintiff should take nothing by his Bill.

Cr. El. 602.

(*a*) 1 Rol. Rep. 400, 401. Vaugh. 93. Cr. Jac. 590. Cr. Car. 240. Hob. 251. Yelv. 128. Doctrin. placit. 86. 2 Sid. 60.

(*b*) Postea 29. b. Cr. El. 602. 1 Brownl. 46, 101. 2 Brownl. 247, 248. 6 Co. 67. b. Cr. Car. 516. 1 Rol. 526, 916. Moor 462. Vaugh. 93. Cr. Jac 590.

Yelv. 130. 2 Sand. 213. 2 Jones 48. 1 Mod. Rep. 299. Swinb. 43, 286, 287. Hob. 251. 3 Rol. Rep. 209. Doctrin. placit. 86.

Mich.

Mich. 41 & 42 Eliz.

In the Common Pleas.

PRINCE'S *Case.*

2 Anderſ. 132. Cr.El. 718,719. 3 Leon. 278. (a) 1 Anderſ. 132. Cr. Jac. 718, 719. 6 Co. 67. b. Swinb. 288. (b) Raym. 484. Swinb. 288. (c) 1 Anderſ. 132. Cr. Jac. 718, 719. Swinb. 288. (d) March 138. Cr. El. 719. Swinb. 288. (e) 8 Co. 135. b. (f) 6 Co. 67. b. (g) Antea 29. a. 1 Brownl. 46, 101. 2 Brownl. 247, 248. Cr. El. 602. 6 Co. 67. b, 1 Rol. 526,910. Moor 462. Vaugh. 93. Cr. Jac. 590. Yelv. 128, 130. 2 Jones 48. 1 Mod. Rep. 299. Swinb. 43, 286, 287. Hob. 251. 1 Rol. Rep. 400, 401. 2 Rol. Rep. 209. Cr. Car. 240, 516. 2 Sand. 213. Doct. placit. 86.

IN Treſpaſs *quare clauſum fregit*, between *John Prince* Plaintiff, and *William Simpſon* Defendant, the Caſe was ſuch; One *Jackſon* being poſſeſſed of a Term for Years, had Iſſue *James* and *Jane*, and made his Will, and made *Jane* his Daughter (then of the Age of 12 Years) his Executrix; and then deviſed the ſaid Term to *James*, then alſo within Age, and died. Adminiſtration *durante minore ætate* of *Jane* was committed to her Mother who took Husband; *James* died, the Husband took Adminiſtration of his Goods, and ſold the ſaid Term, *Jane* took Husband; and the Queſtion was, whether the ſaid Sale was good or not. And in this Caſe three Points were reſolved by the Juſtices of the *Common Pleas*.

1. That ſuch an Adminiſtrator *durante minore ætate*, could not *(a)* ſell any of the Goods of the deceaſed, unleſs it be of Neceſſity, for Payment of Debts, or *(c) bona peritura*, for he hath his Office of Adminiſtration *pro bono & commodo* of the Infant, and not for his Prejudice. Alſo he can't *(d)* aſſent to any Legacy, unleſs there be Aſſets to pay Debts, *&c.* and generally he can't do any Thing to the Prejudice of *(e)* the Infant; for the Words of the Letters of Adminiſtration are, *Adminiſtrationem omnium & ſingulorum bonorum ad opus, (f) commodum, & utilitatem executric' durante ſua minore ætate, & non aliter, nec alio modo committimus, &c.*

2. Such Adminiſtration doth ceaſe at the Infant's Age of *(g)* 17, as it was adjudged between *Piggot* and *Gaſcoign*, *Hill.* 40 *Eliz.* in the *Common Pleas*: And there it was alſo held, That an Infant Executor before 17 cannot aſſent to a Legacy, *&c.* And when *Jane* within 17 took Husband, if it had appeared that the Husband had been of full Age, then the Adminiſtration ſhould ceaſe, for ſhe hath taken a Husband, who might adminiſter as Executor; but it did not appear in the Caſe whether the Husband was of full Age or within Age. And in this Caſe it was ſaid, That Judgment was given in the King's Bench *Paſchæ* 22 *Eliz.*

Eliz. between *Vere* and *(a) Jefferies*, that where one hath Goods only in an inferior Dioceſe, yet the Metropolitan of the ſame Province pretending that he had *bona notabilia* in divers Dioceſes, committed Adminiſtration, this Adminiſtration is not void, but voidable by Sentence, becauſe the Metropolitan hath Juriſdiction over all the Dioceſes in his Province, and therefore it cannot be void, but voidable by Sentence; but if an (*b*) Ordinary of a Dioceſe commits Adminiſtration of Goods, when the Party hath *bona notabilia* in ſundry Dioceſes, ſuch Adminiſtration is meerly void, as well as to Goods within his own Dioceſe as elſewhere, becauſe he can by no Means have Juriſdiction of the Cauſe: And true it is that ſuch Judgment was given.

Vere's Caſe, Paſchæ 22 Eliz. in Bank le Roy.
(*a*) 8 Co. 135. a. 2 Jones 78. Davis 44. a. 47. a. 3 Bulſtr. 176. 4 Leon. 212. 1 Rol. Rep. 423. Cr. El. 457. Moor 145, 693. Swinb. 357. 2 Leon. 155. Hob. 185. Plowd. 281. a. Cr. El. 457.

(*b*) Plow. 281. a. 2 Leon. 155.

Mich. 40 & 41 Eliz.

In the King's Bench.

COULTER's *Caſe.*

Robert Coulter brought an Action of Debt on a Bond of 40*l.* againſt *William Ireland Executorem Teſtamenti & ultim' voluntatis Rich. Hunt*; The Defendant pleaded, that he had fully adminiſtred, and ſo nothing was in his Hands; on which they were at Iſſue, and the Jury gave a ſpecial Verdict; That the ſaid *Richard Hunt* was bound to the Defendant and his Son in a Bond in the Nature of a Statute Staple of 500*l.* and that the Defendant was Executor of his own Wrong, and had 140*l.* of the Goods of the deceaſed in his Hands, and retain'd the ſaid Goods in his Hands to ſatisfy himſelf Part of the ſaid Debt of 500*l.* and whether the ſaid Retainer by an Executor of his own Wrong was lawful or not, was the Queſtion. And it was objected, that the Defendant in ſuch Caſe might retain for divers Reaſons.

Moor 527. Cr. El. 630, 631. 1 Rol. 922.

1. Plaintiff hath by his Declaration affirmed him *fore Executorem*

cutorem Teſtamenti & ultim' voluntatis Rich. Hunt, and the Jury cannot find againſt that which both the Parties have (*a*) agreed in Pleading, as it is agreed in 28 *Aſſ. p.* (*b*) 38. in *Aſſiſe*, (*c*) 9 *H.* 6. 37. *a. b. in Debt*, 1 *Eliz. Dy.* 167. 9 *H.* 7. 3. *a. b. in Reſcous*, &c. and therefore the finding that he is Executor of his own Wrong is abundant and Surpluſage.

(*a*) Raymond 47. 2 Co. 4. b. 2 Rol. 691. Dyer 32. pl. 8. 9 Co. 69. b.

(*b*) 28 Aſſ. pl. 34. Br. Confeſſion 27. Fitz. Aſſiſe 272.

(*c*) Br. Confeſſion 38. Br. verdict. 3. Br. non eſt factum 4.

2. Altho' an Executor of his own Wrong cannot retain againſt a rightful Executor, or againſt an Adminiſtrator, yet he may retain againſt the Pl. who is a Creditor as the Def. is & *eo potius* becauſe he hath affirmed him Executor in his Declaration, as is aforeſaid; & *ideo* againſt him he ſhall have all the Privileges of an Executor, and ſo *reſpective* he ſhall have againſt the one, and not againſt the other.

3. In divers Caſes one who is in of his own Wrong ſhall recoupe and retain, &c. 3 *H.* 6. *Damages* 18. he who hath a Rent of 10 *l.* iſſuing out of certain Land, diſſeiſes the Tenant of the Land, in an Aſſiſe brought by the Diſſeiſee, the Diſſeiſor (*d*) ſhall recoupe the Rent in the Damages, ſo that where the mean Profits of the Land in ſuch Caſe were of the Value of 13 *l.* the Diſſeiſee ſhall recover but 3 *l.* 43 *E.* 3. *Damages* 37. The Diſſeiſor ſhall recoupe all in Damages which he hath expended in amending of the Houſes, 14 *E.* 3. *Damages* 92. 24 *E.* 3. 50. & 14 *Aſſ. pl.* 124. *acc.* 8 *Aſſ. p.* 37. Rent-Service incurred during the Diſſeiſin ſhall be recoup'd, 9 *E.* 3. 8. 4 *H.* 7. 11, 14. *b. acc.* and in 40 *Aſſ. p.* 56. the Wife ſhall retain the 3d Part of the Profits againſt the King in Reſpect of her Right of Dower which ſhe hath to the ſame Lands. So he who is (*e*) Guard. in Socage of his own Wrong ſhall have reaſonable Allowances. But it was reſolved by the whole Court, That an Executor of his own Wrong ſhould not (*f*) retain, for from thence would enſue great Inconvenience and Confuſion; for every Creditor (and chiefly when the Goods of the deceaſed are not ſufficient to ſatisfy all the Creditors) would contend to make himſelf Executor of his own Wrong, to the Intent to ſatisfy himſelf by Retainer, by which others would be barred. And it is not reaſonable that one ſhould take Advantage of his own Wrong; and if the Law ſhould give him ſuch Power, the Law would be the Cauſe and Occaſion of Wrong, and of the wrongful Taking of the Goods of the deceaſed. And the Law of God ſaith, *Non facias malum ut inde fiat bonum, & melius eſt omnia mala pati, quam malo conſentire.* And it is clear, that all lawful Acts, (*g*) which an Executor of his own Wrong, or a (*h*) Diſſeiſor, or Abator &c. doth, is good. And therefore if a Diſſeiſor or Abator endows a Woman who hath Title of (*i*) Dower it is good, and ſhall bind the Diſſeiſee: But if a Woman who hath Title of Dower diſſeiſes the Tenant of the Land ſhe cannot endow her ſelf by Retainer. Alſo if a Woman who hath Title of Dower occupies the Land as Guardian in Socage by her own Right, and not as rightful Guardian ſhe

(*d*) Cr. El. 631. Dyer 2. pl. 7.

(*e*) Cr. El. 631.

(*f*) 1 Rol. 922. Cr. El. 631. Moor 527. 1 Brown. 103, 104. 1 Mod. Rep. 208. 1 Sid. 76. Yelv. 137, 138 Clayton Rep. 116. pl. 203. Swinb. 237, 381 2 Vent. 180. Godb. 217. Stil. 337, 338. Chan. Rep. 33.

(*g*) Plow. 282. b.

(*h*) Dy. 2. pl. 7.

(*i*) Co. Lit. 35. a. 357. b. 2 Co. 67. a. 12 Aſſ. 20. Br. Dower 59. Br. Aſſiſe 181. Br. Damage 96. 6 Co. 58. a.

he shall not endow her self *de la pluis beale*, for that is in Judgment given in the King's Court. Also if a Woman who hath rightful Title of Dower be party or privy or consenting to a Wrong, the (*a*) Assignment of Dower to her is void; as if she procures one to disseise the Tenant of the Land, to the Intent to be endowed by him. And the naming the Defendant *Executor' Testamenti & ultimæ voluntatis*, &c. doth not prove him lawful Executor, for so every Executor of his own Wrong is named, and there is no other (*b*) form of Writ or Count. And as to the Case of Recouper in Damages in the Case of Rent Service, Charge, or Seck, it was resolved, that the Reason of the Recouper in such Case is, because otherwise when the Disseisee re-enters, the Arrearages of the Rent Service, Charge, or Seck, wou'd be revived, and therefore to avoid Circuity of Action, and (*c*) *circuitus est evitandus*, & (*d*) *boni Judicis est lites dirimere, & lis ex lite oriatur*, the Arrearages during the Disseisin shall be recoup'd in Damages: But if the Disseisor ought to have Common in the Land, the Value of the Common shall not be recoup'd, for by the Regress of the Disseisee, he should not have any Arrearages or Recompence for it, as appears (*e*) 27 *H.* 6. 10. And with this Resolution concerning Recouper in Case of Common agreeth the Book in 33 *H.* 6. (*f*) 32. *a.* in *Riche*'s Case. And so the Doubt in 16 *H.* 7. 11. *a.* is well explained. And it appears that the Case of Recouper doth stand on another Reason than the Case at Bar.

(*f*) Br. Trespas 30. Fitz. Bar. 63.

(*a*) 2 Co. 67. a. 3 Co. 78. a. 6 Co. 58. a. 8 Co. 132. b. 15 E. 4. 4. b. Br. Dower 15, 59. Br. Assise 181. Co. Lit. 35. a. 357. b. 1 Rol. 549. 2 Rol. Rep. 17. Plow. 51. a. 54. b. Poph. 64, 100. Br. Damages 96.

(*b*) 1 Brownl. 102. Yelv. 137. 1 Mod. Rep. 208.

(*c*) Co. Lit. 348. a.

(*d*) Postea 37. a. 4 Co. 15. b.

(*e*) Fitz. common. 6. Cart. 76, 77. Br. Grant 2. Br. Common 4. Br. Pernor de Profits 2. Br. Titles 2.

Mich. 41 & 42 Eliz.

In the King's Bench.

HARGRAVE's *Case.*

Body made a Lease for Years rendring Rent, the Lessee died intestate; *Hargrave* took Letters of Administration, and for Rent arrear in his Time after the Death of the Testate, *Body* brought an Action of Debt in the *debet & detinet*, &c. And after Verdict the Def. Counsel moved in Arrest of Judgm. that the Writ ought to be brought in the *detinet tant'*, because the Def. took the Profits in another Right, and

Moor 566. Cr. El. 711, 712. 1 Rol. 603.

(*a*) 5 Geo. c. 13.

and they ſhall be Aſſets in Law. And the Book in (a) 10 *H.* 7. 5. *b.* was ſtrongly urged, for there it is expreſſ held, that in the Caſe at Bar the Writ ſhall be in the *Det net* for the Arrearages incurred in the Time of the Executo of the Leſſee: Yet on good Conſideration and Conferenc had with other Juſtices, it was adjudged, that the Wri ſhould be in the *debet* * & *detinet* in the Caſe at Bar; fo when an Executor or Adminiſtrator takes the Profits, nothin ſhall be (b) Aſſets but the Profits above the Rent; as if th Land be worth 10 *l. per annum*, and 5 *l.* is reſerved, in th Caſe nothing ſhall be Aſſets but the 5 *l.* above the Rent and therefore the Writ ſhall be for the Rent in the *debet* & *detinet*. *Vide Dyer* 7 *E.* (c) 6. 81. *acc.* But note, that i all Actions brought by Executors, (as Executors) the Wri ſhall be always in the (d) *Detinet* only, although the Du accrues in their own Time. As (e) 18 *H.* 8. 3. if the Executo of the Leſſor bring an Action of Debt againſt the Leſſee fo Arrearages incurred in their Time, the Writ ſhall be in th *Detinet* only, 20 *H.* 6. 4. *b.* In Debt upon Arrearages Account, of Aſſignment of the Auditors, by themſelve the Writ ſhall be in the (f) *Detinet* only; for in all Caſ when Executors are bound to name themſelves Executors any Action brought by them, the Writ ſhall be in the *Det net* only, becauſe the Thing or Damages recovered ſhall b Aſſets. And it was adjudged *Paſch.* 36 *Eliz.* in the Exch quer in the Caſe of one (g) *Hitchcock*, that for an † Eſca out of Execution in the Time of the (h) Executor, on a R covery had by the Executor himſelf, he ſhall not have Action in the *debet & detinet*, but in the (i) *detinet* only gainſt the Sheriff, *cauſa qua ſupra*. *Vide* 11 *H.* 6. 7, 8, 3 *Harlewin's* Caſe.

(a) Br. det. 238. Cr. El. 326, 712. 1 Bulſt. 23. 2 Rol. Rep. 132. 2 Brownl. 206. Palm. 117. * Cr. El. 711, 712. Moor 566. 1 Rol. 603, 927. Cr. Car. 225, 226. Cr. Jac. 238, 411, 545, 546, 549, 685. 1 Bulſtr 22, 23. Palm. 116, 117. 2 Rol. Rep. 131, 132, 133. Noy 137. 4 Brownl. 56. 2 Brownl. 202, 203, 204, 205, 206, 207. Allen 34, 42, 43. Stile 61, 80, 81. Hutt. 79. Poph. 121. 1 Mod. Rep. 185. 1 Keble 189, 493. Lit. Rep. 342. 8 Co. 159. a. Poſtea 35. b. 2 Jones 169, 170. 1 Sid. 266, 342, 379. Hob. 282. 1 Vent. 271, 272.

(b) Moor 566. Cr. El. 712. Stile 81. (d) 2 Noy 32. Cr. Rep. 132. Cr. Brief 84. 1 Rol. 264. Hutt. 79. Cent. 300. Poph. 121. Salk. 297, 317. (c) 1 Bulſt. 22. Cr. El. 712. Dyer 81. pl. 6 Brownl. 203, 206. Moor 566. Cr. El. 840. F. N. B. 119. m. 1 Rol. 6 Jac. 225, 238, 545, 546. Br. Executors 15. (e) 2 Jones 170 (f) 2 R Jac. 545. 2 Jones 169, 170. 2 Brownl. 203. Cr. Car. 326. Br. det. 9. Fi 602. (g) Poph. 190. 2 Rol. Rep. 132. Lane 80. Cr. Eliz. 326, 327. H Cr. Jac. 546. † Hob. 38. (h) F. N. B. 121. a. (i) Hob. 272. Je

Hil

Hill. 45 Eliz.

In the King's Bench.

PETTIFER's *Case.*

IN a Writ of Error between *Robinſon*, &c. and *Pettifer*, the Caſe was ſuch; In Debt Judgment was given in the *Common Pleas* againſt two Executors to recover the Debt *de bonis teſtatoris*; upon which a *Fieri facias* was awarded to the Sheriff to levy the Debt *de bonis teſtatoris*, &c. whereupon the Sheriff returned, *Nulla bona*, &c. And upon this Return an Entry was made in the Roll, becauſe *teſtatum eſt* that the Executors had ſold divers Goods of the Teſtator, and converted the Mony to their own Uſe, a Writ was awarded to the Sheriff, to enquire by the Oath of good Men of his Bailiwick what Goods (which were the Teſtator's the Day of his Death) were waſted by the Executors; by Force of which Writ the Sheriff took an Inquiſition, by which it was found that divers Goods of the Teſtator to the Value of the ſaid Debt recovered were waſted by the Executors: And this was returned into Court. Upon which the Plaintiff ſued a *Scire facias* againſt the Defendants to ſhew Cauſe wherefore Execut. ſhould not be awarded of their own proper Goods. And upon two *Nihils* the Court awarded Execution: And thereupon the Executors brought a Writ of Error *in redditione executionis.* And although it was ſaid that the ſaid Courſe was uſual in the *Common Pleas*, and more favourable than the ancient Courſe was, for by this the *Devaſtavit* ſhall not be returned by the Sheriff only, but now ſhall be inquired by Enqueſt returned, and upon that a *Scire facias* ought to be awarded.

Co. Ent. 268. pl. 15. 1 Jones 417, 418. Lit. Rep. 47. 2 Sid. 102. Cr. Car. 564. 2 Inſt. 472. 1 Jones 417, 18.

But it was adjudged that the ſaid Proceeding was erroneous: For when Judgment is given againſt Executors, and on the *Fi. fa.* the Sheriff returns *Nulla bona*, &c. the Plaintiff may have a ſpecial Writ of *Fi. fa. ſcil.* that the Sheriff levy the Debt of the Goods of the Dead, *& ſi ſibi conſtare poterit*, that the Executors have waſted the Goods, then *de bonis propriis*: And that is agreeable to Law and Reaſon;

Cr. Car. 520, 526, 527, 564, 603.

Lib. Intr. 11. 11 H. 6. 16, 36. Kelw. 22. b. Noy 124. Owen 132, 133. Cr. El. 860.

son; To Law as appears in 12 *E.* 3. *Executors* 73. & 85. 9 *H.* 6. 9. *b.* & 57. *b.* To Reason, because in such Case, if the Sheriff makes a false Return the Party may have his Remedy by Action on the Case, which is a good Means to force the Sheriff to make true and just Returns in such Cases. But by the said new Course if the Sheriff takes an Inquest and returns it, although it be false, yet the Party hath no Remedy against the Sheriff, nor against any other: And although a *Scire facias* in the Case at Bar was awarded against the Executors, yet on two *Nihils* returned they shall be condemned, and charged of their own Goods, and yet perhaps had no Notice thereof, the Action sometimes being brought in a foreign County, and sometimes in the County where they dwell, and yet the Executors have not Knowledge thereof, which will be mischievious; and for these Causes the Execution was reversed, but the Judgment stood.

Cr. Car. 528. Dyer 168. pl. 17.

Cr. Car. 527. Cr. Car. 520. 3 Rol. 776.

Pasch. 1 Jacobi,

IN THE

COMMON PLEAS.

ROBINSON's *Case.*

Cr. Jac. 15. Dyer 202. pl. 69.

Robinson and others, Executors of *J. Robinson*, brought an Action of Debt on a Bond against *Robinson*; The Def. pleaded that before the Purchase of this Writ, one of the Plaintiffs as Administrator of *J. R.* brought an Action of Debt on the same Bond in this same Court against the Defendant, who then pleaded, That *J. R.* made Executors who administred; and traversed that he died Intestate: Then

Then the Plaintiff replied, That Adminiſtration was committed to him *pendente lite* between the Executors of the ſaid Will; on which the Defendant demurr'd; and it was adjudged againſt the Pl. And this Plea was pleaded by Way of Eſtoppel, and Judgment demanded, if he as Executor ſhould have an Action of Debt againſt the Defendant on the ſame Bond: The Plaintiffs replied, and ſhewed the Repeal of the Letters of Adminiſtration, and that the Plaintiffs are Executors; on which the Defendant did demur, he pretending, that foraſmuch as one of the Plaintiffs was barred in the former Action, that they ſhould be barred for ever. And the Cauſe was well debated at the Bar and Bench; and at laſt Judgment was given for the Plaintiff. For it was unanimouſly agreed, That by the former Judgment the Plaintiff was barred as to the Action of the Writ, *ſcil.* to have any Action as Adminiſtrator: But although he then in Truth was Executor, yet the Miſtaking of his Action is no Bar nor Eſtoppel to bring his true Action; as if an Heir bring a *Formedon* in the Diſcender, and be barred thereir, yet he may have a *Formedon* in the Remainder, or Reverter. See 3 *E.* 3. 21. 4 *E.* 3. *Eſtoppel* 133. 19 *E.* 3. *Eſtoppel* 227. 18 *E.* 3. 31. 40 *E.* 3. 21. 2 *R.* 2. *Eſtoppel* 210. 6 *H.* 4. 4. 11 *H.* 4. 30. 2 *R.* 3. 14. 21 *H.* 7. 24. 7 *E.* 6. *Eſtoppel* 162.

Cr. Jac. 15,394. 6 Co. 7. b. 8. a.

6 Co. 7. b. Doct. pl. 65,66. Dy. 371. pl. 6. 1 Mod. 207.

Trin. 2 Jac.

In the Common Pleas.

READ's *Case.*

Co. Ent. 144, pl. 23.

READ brought an Action of Debt against *Carter* Ex'or of *Yong*, which Plea began in the *Common Pleas*, *Hill.* 44 *Eliz. Rot.* 401, the Jurors found, that the said *Yong* made his Teſtament and laſt Will, and made one *A.* his Executor; and the Day of his Death was poſſeſſed of Goods above the Value of the Debt in Demand, and died; and before the Will was proved the Defendant took the Teſtator's Goods into his Poſſeſſion, and intermeddled with them; and afterwards, and before the Writ purchaſed, the Will was proved; and if on this Matter the Defendant ſhould be charged as Executor of his own Wrong, was the Queſtion. And on great Deliberation Judgment was given for the Plaintiff. And in this Caſe theſe Points were reſolved.

(a) 2 Leon. 223. 224. 1 Rol. 918. Noy 65. Swinb. 289. 380. Mo. 14. N. Bendl. 72. 1 And. 11. Dyer 166. b. Antea 30. b.

1. When a Man dies inteſtate, and a Stranger takes the Inteſtate's Goods and uſes them, or ſells them, in that Caſe it makes him (*a*) Executor of his own Wrong. For although the Pleading in ſuch Caſe be, That he was never Executor, nor ever adminiſtered as Executor, and therefore it was objected, that he ought to pay Debt or Legacy, or do ſomething as Executor: Yet it was reſolved, and well agreed, that when no one takes upon him to be Execut. nor any hath taken Letters of Adminiſtration, there the Uſing of the Goods of the Deceaſed by any one, or the Taking of them into his Poſſeſſion, which is the Office of an Executor or Adminiſtrator, is a good Adminiſtration to charge them as Executors of their Wrong; for thoſe to whom the Deceaſed was indebted in ſuch Caſe have not any other againſt whom they can have an Action for Recovery of their Debts.

(b) Swinb. 289, 380.

2. When an (*b*) Ex'or is made, and he proves the Will, or takes upon him the Charge of the Will, and adminiſters, in that Caſe if a Stran-

a Stranger takes any of the Goods, and claiming them for his proper Goods, uſes and diſpoſes of them as his own Goods, that doth not make him in Conſtruction of Law an Executor of his Wrong (*a*), becauſe there is another Executor of Right whom he may charge, and theſe Goods which are in ſuch Caſe taken out of his Poſſeſſion after that he hath adminiſtred, are Aſſets in his Hands: But (*b*) altho' there be an Executor who adminiſters, yet if the Stranger takes the Goods, and claiming to be Executor, pays Debts, (*c*) and receives Debts, or pays Legacies, and intermeddles as Executor, there for ſuch expreſs Adminiſtration as Executor, he may be (*d*) charged as Executor of his own Wrong, although there be another Executor of Right; and therewith agreeth 9 *E.* 4. 13.

3. In the Caſe at Bar, when the Defendant takes the Goods before the rightful Executor hath taken upon him, or proved the Will, in this Caſe he may be charged as Executor of his own Wrong, for the rightful Executor ſhall not be charged but with the Goods which come to his Hands after he takes upon him the Charge of the Will. Note, Reader, theſe Reſolutions, and the Reaſon of them, and by them you will better underſtand your Books, which otherwiſe ſeem *prima facie* to diſagree. 41 *E.* 3. 13. *b.* 50 *E.* 3. 9. 7 *H.* 4. 3. *a.* 11 *H.* 4. 83. *b.* 84. *a.* 13 *H.* 4. 4. *b.* 8 *H.* 6. 35. *b.* 9 *H.* 6. 14. *b.* 21 *H.* 6. (*f*) 26 & 27. 32 *H.* 6. 7. *a.* 33 *H.* 6. 21. 21 *E.* 4. 5. *a.* 20 *H.* 7. 5. *a.* 26 *H.* 8. 7. *b.* 8. *a.* 1 *Eliz. Dier* (*g*) 166. 9 *Eliz.* (*h*) *Dier* 255. And ſo the *Quære* in 1 *Mariæ* (*i*) *Dier* 105. well reſolved.

(*a*) Swinb. 289, 380.
(*b*) Swinb. 289.
(*c*) N. Benl. 72. Moor 14. 1 And 11. Dyer 166. b.
(*d*) Latch. 160, 267, 268. Noy 65, 86. 6 Co. 19. a. 1 Sid. 57. 1 Keb. 114. pl. 16. Cro. Car. 88, 89. Hob. 49. 266. Cr. El 460, 565. 1 Rol. 919.
(*e*) Swinb. 289, 380, 381. 1 Rol. 919.
(*f*) 21 H. 6. 27. b. 28. a.
(*g*) Dyer 166. pl. 10, 11, 12. 1 Anderſ. 11. N. Benl. 72. 2 Brownl. 183, 184. Moor 14.
(*h*) 8 Co. 135. b. 9 Co. 39. a. 1 Rol. 918. Swinb. 351, 352. Dyer 355, 356. pl. 8. 1 Keb. 854. Wentw. 250. 2 Inſt. 398.
(*i*) 1 Rol. 918. 1 & 2 Ph. & M. Dyer 105. pl. 17.

Conſtruction of the Statutes of Jeofails, &c. Amendment of Records, Fines, Common Recoveries, &c.

Mich. 25 & 26 Eliz.

In the King's Bench.

PLAYTER's *Caſe.*

PLayter brought an Action of Treſpaſs againſt *Warne*, *Quare clauſum ſuum fregit, & (a) piſces (b) ſuos cepit, &c.* (without ſhewing the Number or Nature of the Fiſh;) the Defendant pleaded Not guilty, and was found Guilty to the Damage, &c. And now this Term in Arreſt of Judgment it was ſhewed, That the Declaration (which by the Law ought to be certain, becauſe it is in a Manner the Foundation of the Suit) was in the Caſe at Bar altogether uncertain for two Cauſes.

(a) Palm. 101. Cr. Jac. 665.
(b) 1 Ventr. 122, 123.

1. It doth not appear by the Declaration of what (c) Nature the Fiſh were, Pikes, Tenches, Breams, Carps, Roches, &c.

(c) 1 Vent. 105, 106, 272. 1 Rol. Rep. 25. Hard. 132. Palm. 101. Cr. Car. 18. Cr. El. 837. 2 Rol. Rep. 442.

2. The certain (d) Number of them doth not appear, but generally *piſces ſuos cepit*; To which it was anſwered by the Plaintiff's Counſel:

(d) Cr. Car. 18. Plow. 128. b. Cr. El. 866. 2 Rol. Rep. 269, 270. 1 Rol. Rep. 25. Cr. Jac. 435. Hardr. 132. Godb. 370. 3 Vent. 272.

1. That it was good by the common Law, for the Verdict hath found the Defendant guilty to Damages, and therefore it is not now material of what Nature, or of what Number the Fiſh were, but taking of Fiſh to Damages in which Caſe the Verdict hath made the Declaration (if it wants Form) good.

2. They conceived that the Declaration in an Action of Treſpaſs without expreſſing the Number or Nature of the Fiſh was good enough, foraſmuch as the Fiſh themſelves are not to be recovered but Damages for them: As in 20 H. 6. 19. in a Writ of (e) Deceit for purchaſing and caſting a Protection, and doth not ſhew in certain of what Nature the firſt Writ was (as in *Formedon*, Aſſiſe, or other Writ) which was delay'd by the Protection, and yet the Writ was adjudged good: And in Treſpaſs on the Caſe the Writ was

(e) Dect. p'. 87, 20 H. 6. 18. a. Fitz. diſceit 33.

that the Pl. did retain the Def. *pro quadam pecuniæ ſumma ſolvend'*, *&c.* without ſhewing the Quantity of the Sum, and yet held good in 11 *H.* 6. 55. *b.*

3. If the Law doth require more *(a)* Certainty as to the Fiſh, then it ſhall be intended that the Judges before whom this Iſſue was tried, did direct the Jury to find the Def. guilty only for the Cloſe for which the Declaration was good, and not for the Fiſh for which the Declaration was inſufficient.

(a) Poſt. 121 a. 8 Co. 57. a. Salk. 129, 364. 5 Geo. cap. 18.

4. Admitting the Declarat. was inſuffic. in the Form thereof by the com. Law, and that it was not made good by the Verdict, yet they conceived that it was remedied by the Stat. of 18 *Eliz. cap.* 14. (for the Stat of 32 *H.* 8 *cap.* 30. doth not extend to Counts) By which Act of 18 *El.* after Verdicts it is provided, "That all Defaults in Form in any Writ Original or Judicial, "Count, Declarat', Plaint, Bill, or Demand, are remedied, and Judgm. for them ſhall not be ſtayed. And it was ſaid, that the Omiſſion of the Number and Nature is but of the Form and not of the Subſtance of the Action, but the Subſtance is for the Taking of the Fiſh; But it was reſolved by Sir *Chr. Wray* Ch. Juſt. Sir *T. Gawdy* and the whole Court againſt the Plaintiff.

And to the 1ſt and 2d Objections it was anſwered and reſolved, That the Declarat. was inſufficient, and was not made good by the Verdict, for the Declarat. ought to reduce the Generalty of the Writ to Particularity, and to declare that which is briefly touched in the Writ in Certainty, to which the Def. may have certain Anſwer, and on which a certain Judgm. may be given, *Quia (b) oportet quod certa res deducatur in judic'*. And true it is, if this Action had been brought by Original the Writ ſhould be general; but the Declarat. ought to have comprehended the Fiſh in *(c)* certain; and therewith agree all the Precedents, and 4 *H.* 6. 11. *b.* where the Writ was *Quare piſcem (d) cepit*, and declared of ſo many Pikes in certain; and altho' the Writ was *piſcem* in the ſingul. Number, yet it was well, for *piſc' eſt nomen collectivum*, in which the plural Numb. is comprehended. *Vide* 21 *H.* 6. 39. *a. b. acc.* that *(e)* the Certainty of the Fiſh ſhall be alledged in the Declarat'; and great Inconven. would thereof follow, for unleſs the Iſſue hath Certainty with which the Jury may be charged, on ſuch a general Incertainty they cannot be charged in Attaint, if they give a falſe Verdict.

(b) Co. Lit. 96. a. 303. a. Poſtea 38. a. 61. a. March. 98. Hard 132.
(c) Poſt. 120, 121. Hard. 132. Co. Lit. 303. a. Plow. Com. 121, 122. Cr. Car. 18. 572. 2 Rol. Rep. 96. Godb. 370. Cr. El. 837. Latch. 195. Cr. Jac. 435, 665. Palm. 101. 447. 1 Vent. 53. 105, 106, 272, 329. 2 Jones 109. Doct. pl. 87. Kelw. 153. pl. 2. Noy 91. O. Bendl. 174.
(d) Br. general brief 9. Doct. placit. 84, 384. Fitz. brief 27. Br. brief 209. Br. faux latin 51.
(e) Fitz. brief 92. Br. faux latin 93.

As to the 3d Objection it was anſwered and reſolved, That when the Jurors have found the Defendant guilty *(f)* generally of the Treſpaſs in the Declaration, *&c.* that without Queſtion doth extend to both the Treſpaſſes, and no ſuch Intendment ſhould be taken as was objected: But if the Pl. Counſel had done wiſely, they would have cauſed the Damages to have been *(g)* ſevered, that is to ſay, ſo much for the Fiſh, and ſo much for breaking the Cloſe, and then the Pl. ſhould

(f) 2 Sand. 170, 171. Lane 98.
(g) Moor 708.

(a) 18 El. c. 14.
(b) Palm. 123, 124. Cr. Car. 147, 148. Poſtea 36. a. 1 Leon. 300.
(c) 1 Jones 199.
(d) Hutt. 57, 79. Antea 31. a. 9. Cr. Jac. 238, 411, 545, 546, 549, 685. 8 Co. 159. a. Cr. El. 350, 711, 712. 1 Rol. 603, 927. Moor 566. 1 Bulſt. 22, 23. Cr. Car. 225, 226. Palm. 116, 117. Noy 137. 2 Rol. Rep. 131, 132, 133. Stil. 61, 80, 81. Poph. 121. 1 Brownl. 156. 2 Brownl. 202, 203, 204, 205, 206, 207. 1 Mod. Rep. 185. Allein 34, 42, 43. Lit. Rep. 342. 1 Keb. 189, 493. 1 Sid. 266, 342, 379. 2 Jones 169, 170. Hob. 282. 1 Vent. 271, 272.

ſhould recover Damages for breaking the Cloſe, with his Coſts.

As to the laſt Objection, it was agreed by the whole Court, that the Omitting of the Nature and Number of the Fiſh, was a Matter of Subſtance, and not of Form to be remedied by the ſaid Statute of (*a*) 18 *Eliz.* for Want of Form within the ſaid Act is ſuch Matter of Courſe, that the (*b*) Clerk might have ſupplied and amended without any Information of the Party, for the Party ought to inform the Truth of the Matter, and the Clerk ought to draw it in Form: But in the Caſe at Bar the Clerk without Information of the Party could not know the Nature or Number of the Fiſh, and therefore it is not Want of Form within the Purview of the ſaid Act. But *Wray* Chief Juſtice ſaid, That every (*c*) Miſpriſion of a Clerk in a Thing which he might have ſupplied and amended without Information of the Party is not remedied by the ſaid Act: As if a Writ be brought againſt Executors in the (*d*) *Debet* and *Detinet*, this is the Fault of the Clerk, but becauſe it is in Matter of Subſtance, that is to ſay, in the Point of the Action, and not Want of Form as the Statute ſpeaks, it is not remedied by the ſaid Act. So there is a Difference between Matter of Courſe and Matter of Subſtance, which the Clerk might have amended.

Trin.

Trin. 30 Eliz.

In the King's Bench.

WALCOT's *Case.*

Lloyd brought an Action of Debt in the Common Pleas against *Walcot* and the Lady *Arnold* his Wife on an Obligation made by the Wife before Marriage; the Defendant pleaded to Iſſue, and found againſt him, on which Judgment was given: The Defendant brought a Writ of Error, and divers Errors were aſſigned, which were all over-ruled by the Court; then one of the Defendant's Counſel moved, that the Writ was brought againſt them in the *Detinet tantum*, where it ought to have been in the *debet & detinet*, for the Wife who is Party to the Action made the Bond her ſelf, and the (*a*) Intermarriage is a Gift in Law to the Huſband of all the perſonal Goods, and Diſpoſition of all Chattels real, and all thoſe he hath to his own Uſe, and not to another Uſe as Executors have. But as againſt the Heir of the Obligor an Action lies in the (*b*) *debet & detinet*, becauſe he hath Aſſets from the ſame Anceſtor in Fee-ſimple in his own Right, ſo hath the Husband the Goods and Chattels of his Wife to his own Uſe, and therefore the Writ ſhall be brought againſt them in the *debet* (*c*) *& detinet, quod fuit conceſſum per totam Curiam:* Then it was moved, That it was Want of Form, and therefore ſhould be amended by the Statute of 18 *Eliz. cap.* 14. becauſe it was but (as it was ſaid) the Miſpriſion of the (*d*) Clerk, which he himſelf ought to have amended and ſupplied: But it was reſolved by the whole Court, That it was Matter of (*e*) Subſtance, and the very Point of the Action, and the ſaid Act remedied only Want of Form; which Reſolution agrees with the Opinion of *Wray* Chief Juſtice in the Caſe before.

3 Leon. 208.

(*a*) Co. Lit. 351. a

(*b*) Cr. El. 450. 712. 1 Jones 199. Plow. Com. 441. a. 10 H. 7. 8. b. 1 Sid. 342.

(*c*) 3 Leon. 206.

(*d*) Antea 35. b. Palm. 123, 124.

(*e*) 1 Bulſt. 152. 1 Jac. 546. Antea 35. a.

Trin 30 Eliz.

In the Exchequer.

BAYNHAM's *Caſe.*

(*a*) Stile 8. Cr.Car.17,162. Cr. Jac.631. Stat.21 Jac.c.13. 2 Rol.Rep.258. 1 Sid. 19 Cr. El. 664.

BEtween *Baynham* and *Brook* in an *Ejectione firmæ* on a Demiſe of the *Rectory* of *A.* in *A. B. & C.* the Defendant pleaded Not guilty, and the Venue came only out of *A.* and the Jurors found the Defendant Guilty, and Judgment was given thereon: And in a Writ of Error this Judgment was reverſed, for the Venue ought to be out of the three Towns; and this Trial was reſolved to be inſufficient, and inſufficient Trials are not remedied by any Statute, for the Statute of 32 *H.* 8. *cap.* 30. doth not extend to a Verdict given between the Demandant * and the (*b*) Vouchee, nor to any Fault in the original Writ, or in the Return thereof, or to the Want of an Original, or in the Count, or to any Inſufficiency in Trial, Verdict, or Judgment, *&c.* And the Statute of 18 *Eliz. cap.* 14. helps many of the ſaid Defects, but doth not remedy any inſufficient Trial, but that remains as it was in the Common Law. And *Wray* Chief Juſtice ſaid, that it was of late adjudged in the King's Bench between *Goodwyn* and *Franklyn*, that where a *Venire facias* was awarded (*c*) to the Coroners where it ought to have been awarded to the Sheriff; and ſo the Jurors returned by one who had not Authority, that it was in the Nature of an inſufficient Trial; and therefore on Conſideration of the ſaid Statutes, and of the Opinion in 21 & 22 *Eliz. Dier* 367, it was reſolved that it was not remedied by any of the Statutes; but for this Cauſe a new *Venire facias* was awarded: *Et verum dixit*, for I was of Counſel with *Franklyn* in the ſame Caſe: But the principal Caſe in the Lord *Dier* was held good Law, becauſe there the *Venire Facias* was awarded *ex* (*d*) *aſſenſu partium*, & *omnis* (*e*) *aſſenſus tollit errorem.* And in this Caſe *Wray* Chief Juſtice ſaid, that it had been adjudged in this Court in *Gardiner's* Caſe, that if on the *Venire facias* but (*f*) 23 be returned, and 12 appear and give a Verdict, that is remedied by the ſaid Acts of 32 *H.* 8. & 18 *Eliz.*

(*b*) 8 Co. 162. b. 11 Co. 6. b. 1 Anderſ. 26. 27. pl. 60. O Benl. 12. N. Benlow 37. Benl. in Kelw. 207 b. Benl. in Aſh. pl. 5. Hob. 281. 21 Jac. c. 13.

(*c*) Godb. 429. 2 Rol Rep.363. Cr. El. 574. 586, 894. 8 Co. 162. b. 163. a. Hut.26. Co. Lit. 125. b. Cr. Jac. 21. Yelv. 15. 1 Rol. Rep.28. 3 Bulſt. 175. Moor 356. Dyer 367. pl.40. 2 Rol. 668,669. Brownl. 134.

(*d*) Co. Lit. 125. a. 126. a. Cr. El. 664. 2 Rol.Rep 363. Hob. 5. Jenk. Cent. 310. Poſt. 40. b. O. Bendl. 83. Godb. 429.

(*e* Co.Lit 37. a. 126. a. 180. a. Poſtea 40. b. 2 Rol.Rep.363. 1 Bulſt. 216.

(*f*) Cr.El.194, 586, 587. Poſte a 37. a.

Paſch. * 31 Eliz. *Rot.* 301.

In the King's Bench.

* The Original is 31 Eliz. but Q. if it ſhould not be 21.

GARDINER's *Caſe.*

BEtween *Tirrel* and *Gardiner* on Iſſue joined, 23 (*a*) Jurors were only returned, whereof 12 did appear and give Verdict; and that was moved in Arreſt of Judgment: And on great Deliberation it was reſolved, That it was remedied by the Statute of 18 *Eliz. cap.* 14. and thereupon Judgment was given accordingly; which was the Caſe which *Wray* Chief Juſtice cited in the Caſe next before.

(*a*) O Benl. 95. Cr. El. 194, 586, 587. 2 Brownl. 274. Cr. Car. 223, 224, 278, 279. Antea 36. a. 1 Jones 245, 302, 357. 1 Rol. 800. Cr. Jac. 647. 2 Show. 309.

Latch 54. Savil 124. 1 Sid. 66.

Paſch. 34 Eliz.

In the King's Bench

BISHOP's *Caſe.*

Matthew Biſhop brought an Action on the Caſe againſt *Michael Harecourt* in the Common Pleas by original Writ, ſetting forth that the Defendant in Conſideration that the Plaintiff had given and delivered to the Defendant a Horſe; and that the Plaintiff promiſed the Defendant that he on 90*l.* to him by the Defendant to be paid, would deliver to the ſaid *Michael* an Indenture, *inter William Ward ex una parte, & Agnetem Frawkener ex altera parte fact*, &c. and a Bond by which *Tho. Ward* and *Chriſtopher Biſhop* were bound to the ſaid *Agnes*, &c. in 500*l.* aſſumed, and to the ſaid Plaintiff did promiſe to pay him 90*l. Termino Trinit.* next following: And the Plaintiff declared, and the Writ and Declaration agreed in all but only in this, That where by the Writ the ſaid Bond of 500*l.* was alledged to be made by *Tho. Ward* and *Chriſt. Biſhop*, &c. in the Declaration he was named *George Biſhop*, &c. And the Def. pleaded *Non aſſumpſit*, and found againſt him, and Judgment given

1 Leon. 210, 211. 1 Anderſ. 240. Cr. El. 210.

3 Bulſtr. 224, 228. 1 Rol. Rep. 432. 2 Rol. Rep. 252. Cr. Jac. 629, 630. O Benl. 51. Palm. 193.

given accordingly. And the Defendant brought a Writ of Error, and aſſigned divers frivolous Errors to which the Court gave no Regard. And then another Error not aſſigned was moved, *ſcil.* the ſaid Variance between the original Writ and the Declaration. For the Declaration in the Common Pleas always recites the Writ, by which it appeared that the Writ was *Chriſtopher Biſhop*, (who was one of the Obligors in the ſaid Bond) and the Declaration was *George Biſhop*. And on that after *in nullo erratum* pleaded, the Plaintiff by *Certiorari* out of the King's Bench removed the original Writ, by which the Variance appeared to the Court. And it was moved, That it ſhould be helped by the Statute of 18 *Eliz. cap.* 14. by which it is enacted, That after Verdict no Judgment ſhall be reverſed for Want of Form, &c. or for any Want of any Writ original or judicial, or Default in Proceſs: And here wants an original Writ in our Caſe, for the Action on the Caſe conſiſts on two Parts, *ſcil.* on Conſideration and Promiſe. And as to the Conſideration, the Writ and Declaration vary, and ſo no original Writ to warrant this Declaration; and if that ſhould not be within the Letter of the Act, yet it would be within the Meaning and Intent of it, becauſe it was in equal Miſchief. Alſo it was moved, That after in *(a) Nullo eſt erratum* pleaded, no Writ of Diminution, or *Certiorari* ſhould be awarded, as it is agreed in *(b)* 7 *E.* 4. *(c)* 25. *b. (d)* 22. *E.* 4. *(e)* 28 *H.* 6. 10. *b.* but if any ſhould be awarded by the Diſcretion of the Court, it ſhould be only to aſſure them of the Truth for the amending the Record in Things amendable, and to ſalve the former Judgment, according to the Truth of the Caſe, but never to reverſe the Judgment, as it would be in our Caſe.

But as to the firſt it was anſwered and reſolved by the whole Court, That this *(f)* Variance between the original Writ and the Declaration was not remedied by the Statute of 18 *Eliz.* nor any other Statute; and a Difference was taken by the Court when there was an *(g)* original Writ, which in Matter of Subſtance varieth from the Declaration, that was not remedied by the ſaid Act, *Quia Caſus omiſſus & oblivioni datus, diſpoſitioni juris communis relinquitur*; but when there is *(h)* no original Writ, that was expreſly remedied by the Act.

As to the ſecond Point they all agreed, That when the original Writ is removed (be it before *in nullo eſt erratum* pleaded, or after,) and a material Variance appears to the Court between the Writ and the Declaration, the Judgment ſhall be reverſed: And ſo it hath been done before this Time, as *Wray* Chief Juſtice ſaid.

Trin.

(a) 1 Jones 9, 140. Latch. 152. Noy 83, 84. 1 Rol. 764, 765. Stil. 175, 176. 1 Rol. Rep. 432. 2 Bulſtr. 71. Cr. Jac. 6, 141. Cr. El. 84, 155, 281, 282, 836, 837. 1 Leon. 22, 23, 176. 2 Leon. 3. 1 Sid. 139. Hard. 112. Palm. 285.

(b) 2 Bulſt. 71. 1 Leon. 22. 2 Leon. 3. Palmer 285. 1 Jones 140.

(c) Fitz. Error 44. Br. Error 166.

(d) 22 E. 4. 45. b. 46. a. b.

(e) Fitz. Error 29. Br. Error 12.

(f) 8 Co. 163. a. 4 Bulſt. 224. 2 Rol. Rep. 252. Cr. Jac. 629, 630. O. Benl. 51. 1 Rol. Rep. 432. Palm. 193. Winch. 69.

(g) 1 Jones 304. Cr. El. 722. Cr. Jac. 185, 654. Doctrin. placit. 385. Yelv. 109. 3 Bulſtr. 224. 1 Sid. 84.

(h) 3 Bulſt. 224. Doct. placit. 385. Cr. Car. 272, 282. Cr. Jac. 185, 654, 655. Cr. El. 722. 1 Sid. 84. 1 Jones 304. 5 Co. 4. Caudries Caſe. Vide 5 Geo. cap. 13.

Trin. 34 Eliz.

In the King's Bench.

TEY's *Case.*

Thomas Tey and *Eleanor* his Wife levied a Fine to *Robert Drury* and *Tho. Cannock*, and to the Heirs of *Robert Drury*, of the Manors of *Layerdelahay*, *Layer Bretton*, and of divers other Manors, and of a great Number of Acres of Land, Meadow, Paſture, &c. in *Layerdelahay*, *Layer Bretton*, *Magna Bretton*, *Magna Birch*, and many other Towns in the County of *Eſſex*. And in the ſaid Fine divers Grants and Renders were made: And in the third Render the Manors of *Layerdelahay*, *Layer Bretton*, and divers other Manors, & *tenementa prædict'* in *Layerdelahay*, *Layer Bretton*, *Neverds* and *Magna Birch*, were granted and rendred to the ſaid *Thomas* and *Eleanor*, and to the Heirs of the ſaid *Thomas*. And by the fourth Render 115 Acres of Land in *Layer Bretton* and *Magna Birch*, were granted and rendred to *Eleanor* in Tail, the Remainder to the Right Heirs of Sir *Tho. Tey*: And after the Death of *Thomas Tey*, *William Tey* his Brother and Heir brought a Writ of Error, and aſſigned Error in the Grant and Render made by *Drury* and *Cannock*; and that was for the Repugnancy between the third and *(a)* fourth Render, for by the third Render all the Tenements in *Layer Bretton* and *Magna Birch* were rendred to *Thomas* and *Eleanor*, and to the Heirs of *Thomas*; and by the fourth Render, certain of the ſaid Tenements are granted and rendred to the ſaid *Eleanor* in Tail, the Remainder to the right Heirs of Sir *Thomas Tey*; ſo one and the ſame Thing is granted and rendred to ſeveral Perſons and of ſeveral Eſtates, and ſo repugnant, and erroneous: For it was ſaid, That a Fine is like a Judgment, for a *Sci. fa.* lies to execute it, as of a Judgm. and *oportet* (as *Bracton* ſaith) *Quod (b) certa res deducatur in judicium*: As in Caſe where there are two Demandants, and the Court

(*a*) Jenk. Cent. 256.

(*b*) Antea 35. a. Co. Lit. 96. a. 303. a. Hardr. 132. Poſtea 61. a. March 98.

ſhould

ſhould adjudge one and the ſame Thing to each Demandant ſeverally, it would be Error as well for the Repugnancy, as for the *(a)* Doubtfulneſs to which of them the Court ſhould make Execution. As in the Caſe of 3 *H.* 6. 44. *b.* where two Avowants are, and one avows for Rent-Service, and the other for Rent-Charge, both the Avowries *(b)* ſhall abate; for the Court will be in doubt to which of them Return ſhall be awarded; ſo here in the Caſe at Bar, becauſe the ſame Thing is granted and rendred in the third Render to one, and in the fourth to another, becauſe both cannot have one and the ſame Thing, for the Contrariety and Incertainty to whom the Court ſhall make Execution, it is erroneous. And it was further objected, that a Fine ought to be more certain than a Judgment, or any other Record, for a Fine can't be receiv'd being levied to two *(c)* and to their Heirs, as it is held in 2 *H.* 5. 7. *a. b.* & 24 *E.* (*d*) 3. 36. and a Man cannot acknowledge the Right to two, as it is held in 27 *E.* 3. 79. Neither can a Fine be levied on (*e*) Condition, as it is held in 22 *H.* 6. But after many Arguments at Bar and Bench, Firſt, it was reſolved by them, That the (*f*) fourth Render, as to that which was contained in the third Render ſhould be of the ſame Condit. and Quality in Conſtruct. as a Charter, or other Conveyance between Party and Party, and need not have ſuch preciſe Form as a Writ or a Judgm. But a Conuſance of a Fine and a Grant and Render ſhould have the like Conſtruct. as another (*g*) Conveyance between Party and Party, for it hath the Words of Grant and Render, becauſe it is a Conveyance of Record. And although a Fine may be refuſed in the Caſes which have been put, yet if ſuch Fines be received they would be good enough in all the ſaid Caſes, for *fieri non debuit, ſed factum valuit*; and therefore if a Fine be accepted to two and their Heirs, or if the Conuſance of Right be to two, or if a Fine be on Condition, in all theſe Caſes and other like, the Fine (*h*) ſhall ſtand, and ſhall not be reverſed by Writ of Error. 2. In the Argument of this Caſe, all the Parts of a Fine *ſur conuſans de droit come ceo*, &c. were recited and peruſed. And it was reſolved by the whole Court that there are five (*i*) Parts of every Fine, that is to ſay, an original Writ, for without (*k*) an original Writ a Fine cannot be levied, as appears by the Stat. *De* (*l*) *modo levandi Fines*, that the Order of Law will not ſuffer that a final Accord be levied in the

(*a*) Antea 19. a. Hob. 128. 1 Rol. 353. Moor 864, 865.
(*b*) Antea 19. a. Plowd. 10. b. Manxel's Caſe. 21 R. 2. Fitz. Avowry 262. Br. Avowry 6. in Fine. Moor 865.
(*c*) Fitz. Fines 15, 77. 7 H. 4. 7. b. 24 E. 3. 36. b. 37. a. Br. Fines 10, 31. 33 H. 6. 52. b. 2 Co. 72. b. 1 Leon. 62. 3 Co. 84. a.
(*d*) 24 E. 3. 36. b. 37. a. Fitz. Fines 77.
(*e*) 2 Rol. 18. 44 E. 3. 22. a. Fitz. Fines 15, 36. 27 H. 8. 24. a. Br. Fines 5, 10. Br. Done 3. 33 H. 6. 52. b. Perk. ſect. 629. Plowd. 34. b.
(*f*) Jenk. Cent. 256.
(*g*) Jenk. Cent. 256. Poſtea 45. b. 6 Co. 66. b.
(*h*) 27 H. 8. 24. a. Br. Fin. 5.
(*i*) Raym. 71. Co. Lit. 121. a. 2 Inſt. 511.
(*k*) 2 Inſt. 513, 514. 1 H. 7. 9. a. Br. Fine. B. N. C. 461
(*l*) 2 Inſt. 510, 511, &c

Levies, &c. 85, 97. in Fine. Fitz. Fines 27. 21 E. 4. 4. b. Plowd. 394. Fitz. Aſſiſe 13. Br. Aſſiſe 396. Fitz. Error 28. Br. Judgment 114, 130.

King's Court without an original Writ; and ſo it is held 37 (a) *Aſſ.* 17. And on every Writ, by which Land is demanded, or by which Land is to be charged or bound, or which in any Sort doth concern Land, &c. (b) a Fine may be levied. See for that 5 *E.* 2. *Statham Fines*, & 18 *E.* 4. 22 *a. b.* 19 *E.* 4. 2. 21 *E.* 4. 4. *b.* 32 *E.* 3. *Scire facias* 100. *in Præcipe, in Warrantia Chartæ*, in a Writ of Meſn, in *Quid juris clamat, Per quæ ſervitia*, in *Ration' dimiſſ. & ſimilia.*

(a) Br. Judgment 114. Br. N. C. 461. Br. Error 129. Br. Fines, Levies, &c. 82.
(b) 2 Inſt. 513.

2. There ought to be a Licence or (c) Leave to agree, for which Licence there is a (d) Fine due to the King, which is an ancient Revenue of the Crown, and that is (e) called the King's Silver; and that fully appears by the ſaid Stat. *De modo levandi fines.* And the Entry of the King's Silver in ſuch Caſe at the Bar was ſuch, *Robertus Drury armig' dat domine Reginæ ſeptem libr' pro Licentia concordandi cum Thoma Tey armiger' & Elianora uxore ejus, de placito conventionis, de maneriis de*, &c. *& habet Chirographum per pacem admiſſum, coram Jacobo Dier. Et nota bene*, The Uſe is that he in whom the Fee (f) repoſes, pays the King's Silver, and not the other Conuſee who hath but for Life, and all the Precedents agree therewith. And note the King's Silver is entred on the Writ of (g) Covenant, and ought to expreſs, 1. The Sum given for the Licence to agree. 2. The Party who pays it, that is to ſay, he in whom the Fee repoſes. 3. The Plea and between whom, &c. And 4. The Land for which the Fine is paid; and all this was well obſerved in the Caſe at Bar.

(c) 2 Inſt. 511, 512.
(d) 1 Leon. 249, 250. 2 Leon. 56, 179, 233, 234.
(e) Poſtea 43. b.
(f) 2 Inſt. 512.
(g) Poſtea 43. b. 44. a. Dyer 320. pl. 19.

3. The Concord, and that begins thus, *Et eſt concordia talis*, ſcil. *quod præd' Tho. & Eleanora recognoverunt maner'*, &c. *eſſe jus*, &c. *Et notand' eſt*, that this is the Foundation and Subſtance of the Fine. For if thereon the (h) King's Silver be entred, altho' the Conuſor dies afterwards, the Fine is good, as it was adjudged in *Carrel's* Caſe 5 *Eliz. Dy.* 220. *b.* And the Note and the Foot of the Fine are but Abſtracts out of it, but the Concord is the Ground and Subſtance of the Fine.

(h) Co. Ent. 231. a. Hob. 330. 2 Inſt. 511, 512. 4 Leon. 96. 2 Sid. 56.

4. The Note of the Fine, and that is but an Abſtract out of the Original and the Concord, and begins in this Manner, *ſcil. inter Robert' Drury & Tho. Cannock querent', & Tho. T. & E. uxor' ejus deforcean' de maner', &c. unde placit' conventionis ſummonit' fuit inter eos*, ſcil. *quod præd' Tho. Tey & Elianora recognover' maner', &c. eſſe jus, &c.* But it was obſerved, that in old Books the Note of the Fine is taken for the Concord, as in 12 *H.* 4. 16. *a.* that the (i) Note of a Fine is pleadable before the Fine engroſſed, and (k) 22 *H.* 6. 51. *acc.* But that is intended of the Concord it ſelf; and all the Pleadings in *Quid juris clamat*, &c. that the Leſſee had Fee the Day of the Note levied, are to be intended of the Concord it ſelf.

Dyer 89. b. 220. pl. 15. 254. a. Hutt. 135.
(i) Doctrin. placit. 307. Br. Fines Levies, &c. 41.
(k) 22 H. 6. 13. a. Doct. pl. 307.

5. The Foot of the Fine, and that begins ſo, that is to ſay, *Hæc eſt finalis concordia facta in Curia Domini*

Domini Regis, apud Weſt. a die Paſchæ in quindecem dies, anno, &c. coram Jacobo Dyer, &c. So that the Foot of the Fine includes the whole, and hath the Day, Year, Place, and before what Juſtices the Concord was made. And a Fine is ſaid to be * engroſſed when the Chirographer makes the Indentures of the Fine, and delivers them to the Party to whom the Conuſance was made. And it is to be known, that if a Fine is levied of a Reverſion, the Conuſee preſently (*a*) after the Conuſance, which is the Concord, ought to ſue a (*b*) *Quid juris clamat* againſt the Leſſee; for if the Conuſee ſtay till the Fine be ingroſſed he ſhall never have a *Quid juris clamat*, for preſently by the Record and Conuſance the Reverſion paſſes. *Vide F. N. B.* 147. & 22 *H.* 6. 57. *acc'*. And at the Common Law immediately after the Fine ingroſſed, it was ſent into the (*c*) Treaſury, as appears in 17 *E.* 3. 29. a. But now by the Statute of 5 *H.* 4. *cap.* 14. it is enacted, That all the Parts of the Fine ſhall be (*d*) enrolled with the chief Clark of the Bench (who is the *Cuſtos Brevium*) before the Chirographer hath them out of Court. And note before this Statute the *Cuſtos Brevium* had not any Rocord of the Fine but the Chirographer, and nothing remains with the Chief Juſtice of the Common Pleas but the Licence to accord. And note it is provided by the ſame Statute, that the original Writ ſhall be of Record. And the Uſe is to direct a Writ of Error to the Ch. Juſt. of the Bench, another to the *Cuſtos Brevium*, to certify *tranſcript' pedis finis*, and another to the Chirographer to certify *tranſcriptum notæ finis*. And note that Words are added in the Writ to the *Cuſtos brevium*, *cum* † *omnibus eundem finem tangen'*, by Force of which Writ he certifies the original Writ. 3. It was reſolved that the Conuſor ſhould not aſſign Error in the Grant and Render, by which he himſelf took an Eſtate, no more than the Conuſee ſhall do in the Conuſance, for that is to defeat the Eſtate which by the Fine is given to him; nor ſhall the Recoveror bring a Writ of Error to defeat the Record in which he himſelf doth recover; for the Judgment in the Writ of Error is to be reſtored to all that which he loſt by the Fine or Judgment, and not to avoid and loſe that which he hath gained by the Fine or Judgment, 7 *E.* 3. 25. *b.* A Man ſhall not reverſe a Judgment for Error, if he cannot ſhew that the Error is to his (*e*) Diſadvantage, 8 *H.* 5. *b.* *F. N. B.* 21. *acc'*. and afterwards the Fine was affirmed.

* F. N. B. 147. a.

(*a*) F. N. B. 147. a. 3 Co. 86. a. 6 Co. 68. a. Br. Quid juris clamat 14. Br. Attornment 25. 22 H. 6. 13. b. Plowd. 431. b.

(*b*) F. N. B. 147. a.

(*c*) Fitz. Scire facias 8.

(*d*) Lane 62.

† Dy. 89. pl. 2.

(*e*) 8 Co. 59. a. 7 Co. 4. b. 1 Rol. 757, 759, 760, 784. Palm. 39. 11 Co. 56. a. Jenk. Cent. 256, 257, 286. Fitz. Error 92. Br. Error 37. 8 H. 5. 2. b. F. N. B. 21. f. 7 H. 4. 16. a. 11 H. 4. 88. b. 89. a. 2 Sand. 46. Cr. Eliz. 84, 107. Dy. 315. pl. 99.

Paſch.

Paſch. 35 Eliz.

In the King's Bench.

DORMER'S *Caſe.*

Common Recovery. Poph. 22,23,24. 2 Inſt. 519.

William Dormer Eſquire, Son and Heir of *Jeffrey Dormer* brought a Writ of Error on a Judgment given in a Writ of Entry in the Poſt, on which a commmon Recovery was had in the Common Pleas, between *John Crooker* and *George York* Demandants, and the ſaid *Jeffrey* Tenant of the Manor of *Farninghoe cum pertinentiis, & ſex meſuagiis, ſex cotagiis, duodecim gardinis,* 400 Acres of Land, 60 Acres of Meadow, 400 Acres of Paſture, 2 Acres of Wood, 60 Acres of Moor and Heath, and 40 *s.* Rent in *Farninghoe*, and of one Yearly Rent or Penſion of 4 Marks, *exeunt' de Eccleſia ſive rectoria de Farninghoe in Com' Northampton*; and that the Tenant vouched *H.* the common Vouchee, and Judgment was given, *Ideo conſideratum eſt quod prædict' Georgius & Johannes recuperent ſeiſinam ſuam verſus præfat' Galfridum de manerio, tenement', & reddit' præd' cum pertinen', ac de * advocatione Eccleſiæ præd': Et quod idem Galfridus habeat de terra præd' Henrici* the Vouchee, *ad valentiam, &c.* In this Record divers Errrors were aſſigned.

* 2 Vent. 32. Poph. 22, 23. 1 Mod. Rep. 250. 2 Rol. Rep. 67. 2 Co. 74 a. Jenk. Cent. 257. Cr. Cr. 270. Poſtea 40. b. Raym. 71. 1 Rol. Rep. 303.

1. Becauſe the Writ of Entry was *de uno annuali redditu ſive penſione quatuor marcarum exeun' de Eccleſia ſive rectoria*; It was ſaid that this was erroneous for two Cauſes: 1. Becauſe a Penſion is properly a Sum demandable in the (*a*) Eccleſiaſtical Court, and a Rent is a Thing demandable by our Law. 2. The Demand of Rent, or Penſion in the (*b*) Disjunctive is utterly incertain, and every *Præcipe* ought to be of a Thing certain, for although the Grant be in the Disjunctive, the *Præcipe* in a Writ of Annuity ſhall be of a Thing certain. *Vide* 11 *E.* 3. (*c*) *Annuity* 27. 5 *E.* 4. 6. And ſee in my Reports Sir *Rowland* (*d*) *Heyward*'s Caſe: But otherwiſe it is in Aſſiſe. *Vide* 3 *E.* 3. *Aſſiſe* 175. 11 *Aſſ.* 8. & 29 *Aſſ.* 7. 11 *E.* 3, *Variance* 69. *Alternativa petitio non eſt audienda,*

(*a*) Poph. 23.

(*b*) Poph. 23.

† F.N.B. 152. h. Co. Lit. 145. a. (*c*) 2 Co. 37. a. Poſtea 41. a. (*d*) 2 Co. 37. a.

Anoth. Err. was aſſign'd, That a Writ of Entry in the Poſt lies not

not of an Advowſon, as appears by the Statute of *Weſt.* 2. (*a*) *cap.* 5. 4 *E.* 3. 162. 14 *H.* 4. 33. *a.* no more than of Common of Paſture, 4 *E.* 3. 146. 27 *H.* 8. 12. *a.* But the Judgment was affirmed by the whole Court. And in this Caſe four Points were reſolved.

1. That a common Recovery is not to be compared to a Judgment or Proceeding in any other real Action for three Cauſes. 1. Becauſe it is now by Uſage and Cuſtom become a common Aſſurance and Conveyance of Lands, &c. for it may be averred to an Uſe; and if Tenant for Life ſuffers a common Recovery, it is a (*c*) Forfeiture. 2. That it is had by mutual Conſent of the Parties, & (*d*) *conſenſus tollit error'*, 39 *E.* 3. 1. the Demandant and Tenant conſent that two (*e*) of the four in the Writ of Right ſhall be Eſquires, where by the Law they ought to be Knights, and well, becauſe by conſent, 44 *E.* 3. 6. *b.* Trial of (*f*) Villenage alter'd from the natural Trial by Conſent, 7 *H.* 6. 7. *b.* Pleading of a Feoffment in * Fee on Condition without Deed and Re-entry is good, if the other Party confeſs the Condition, 34 *E.* 3. *Office de Court* 12. If 12 be ſworn and one depart (*g*) another of the Panel by conſent may be ſworn, and with the 11 give Verdict, 11 *H.* 6. 13. The Court in a *Quare Impedit* by Conſent may give longer Day than is limited by the Stat. of *Marlebridge*, 11 *H.* 4. The Stat. of 2 *E.* 3. & 20 *E.* 3. provide, That neither for the Great Seal (*h*) nor Petit Seal, Juſtice ſhall not be delayed; yet when the Matter doth concern the King only, if he command it, it may be ſtayed, *F. N. B.* 21. *b.* 27 *H.* 8. A Tenure may be created at this Day by Conſent of all, notwithſtanding the Stat. of *Quia emptores terrar'*, 6 *E.* 6. *Dy.* 78. By ſpecial Conſent of the Parties, a (*i*) Re-entry may be for Default of Payment of Rent without Demand of it. And divers other Caſes were put where Conſent of the Parties ſhall alter the Form and Courſe of the Law. 3. Otherwiſe no Aſſurance could be of an (*k*) Advowſon, (*l*) Commons in Groſs, &c. to bar Rem'rs or Rev'ns expectant on Eſtates-tail: The ſame Law of Common of Paſture, Franchiſes, Liberties and Privileges, as to have Felons Goods, &c. Waifs, Strays, &c. *Et ſæpenumero neceſſitas vincit commun' leg'*, & *quod neceſſari' eſt licit' eſt.* As if two Jointenants (*m*) be of Land to them and to the Heirs of one of them, they ſhall not join in a Writ of Right. But two Jointenants to them and to the Heirs of one of them of an Advowſon ſhall join in a Writ of Right of Advowſon. And the Reaſon of the Difference is, becauſe in the firſt Caſe they have ſeveral Ways and Remedies, as it is agreed in 46 *E.* 3. 21. *b.* But in the other Caſe if the Tenant for Life ſhould not join with him who hath the Fee, neither the one nor the other would have any Remedy; and therefore in ſuch Caſe, *neceſſitas vincit legem. Vide* 21 *E.* 3. 27. & *nota Dictum de Stone there. Vide* Sir *William Pelham's* (*n*) Caſe in the firſt Reports.

2. A

(*a*) 2 Inſt. 353. 354, 355, &c.
(*b*) Jenk. Cent. 257. Poph. 23. Poſtea. 46. a. 1 Co. 15. b. Cr. Car. 270.
(*c*) Poph. 23. 1 Co. 15. b. 10 Co. 44. a. 2 Leon. 60, 61, 62, 67. 4 Leon. 123, 124, 125, &c. 133. 1 Anderſ. 227. Co. Lit. 356. a. 362. a. Moor 271. Vaugh. 51. 2 Brownl. 170. 1 Rol. Rep. 304. 2 Co. 74. a. 3 Co. 4. b.
(*d*) Co Lit. 37. a. 180. a. 126. a. 5 Co. 36. b. 2 Rol. Rep. 363. 1 Bulſt. 216.
(*e*) Godb. 429, 430. 39 E. 3. 2. b.
(*f*) Godb. 429. 1 Rol. Rep. 28. Raym. 372.
* Doct. pl 176.
(*g*) Godb. 429.
† 52 H. 3. Stat. de Marl. c. 12. 2 Inſt. 123, 124.
‖ 2 E. 3. c. 8.
†† 20 E. 3. c. 1.
(*h*) F. N. B. 240. d
(*i*) Palm. 411. Godb. 429. 1 Rol. 459.
(*k*) 1 Mod. Rep. 250. 2 Vent. 32. Poph. 22, 23. 2 Rol. Rep. 67. Jenk. Cent. 257. 2 Co. 74. a. Cr. Car. 270. Raym. 71. 1 Rol. Rep. 303.
(*l*) Jenk. Cent. 257. Poph. 23.
(*m*) Br. Jointenants 6.
(*n*) 1 Co. 14. b. 15. a. b. 2 Leon. 60. 4 Leon. 123. Moor 271.

2. As to the Demand of the (*a*) Rent, or Penſion of four Marks iſſuing out of the Rectory, it was reſolved, That the Writ was good enough, for here is not any (*b*) Incertainty, for one of two ſeveral Things is not demanded, but one Thing only is demanded, for the Demand is of a Rent or Penſion of four Marks, ſo that there is not but one four Marks. And in this Caſe *redditus* and *penſio*, as this Caſe is, are *ſynonyma*. For theſe later Words (*exeunt' de rectoria*) prove it to be a Rent, for if it was but an Annuity, then it would not be iſſuing out of the Rectory, but the Parſon in ſuch Caſe ſhould be charged in Reſpect of the Rectory. And in 11 *E.* 3. (*c*) *Annuity* 27, there one granted by Deed *quandam annuam penſionem unius robæ precii unius marcæ, vel unam marcam.* 22 *E.* 3. 4. *Lacy*'s Caſe, there an Abbot granted *quandam annuam penſionem &c.* and *F. N. B.* 231. *H.* the Writ *de annuali penſione:* By which it appears, that *penſio & annuitas*, or *annualis redditus* are all one, and principally in the Caſe at Bar, when it is alledged to be iſſuing out of the Rectory. And if a Writ be brought *de redditu, ſive annuitate, exeunt'* out of the Manor of *D.* it is good enough for the Cauſes aforeſaid

(*a*) Poph. 23.

(*b*) Palm. 265.

(*c*) Antea 40. a. 2 Co. 37. a. Co Lit. 145. a.

3. It was alſo reſolved, that common Recoveries are ſo uſual, and their Form and Order of proceeding ſo notorious by Appearances the firſt Day, and *gratis*, *&c.* that the Law takes Knowledge of them; and therefore the Judges *ex Officio*, without Allegation of the Party, ſhall take Notice that they are Recoveries had by Conſent of the Parties for Aſſurance of Lands as in *Wimbiſhe* and *Talboy's* Caſe, *Plow. Com.* 56. Recovery in *Formedon* appeared to the Judges to be by Conſent of Parties, becauſe the Tenant was not eſſoined, nor demanded the View, *&c.* but appeared the firſt Day and confeſſed the Action. *Vide Plow. Comm.* 515. in *Stowel's* Caſe, that the (*d*) common Uſage in theſe Caſes of Recoveries is to be allowed, and that in them the Intent of the Parties is to be obſerved.

(*d*) 2 Co. 74. a.

Mich. 35 & 36 Eliz.

In the King's Bench.

ROWLAND'S *Caſe.*

IN an *Ejectione firmæ* between *John Rowland*, alias *Steyner*, Plaintiff, and *William James*, and *William Sherive*, Defendants of Lands in *W.* in the County of *Worceſter*, on Not guilty pleaded the Jury found for the Plaintiff: And now it was moved in Arreſt of Judgment, that on the *Venire facias* no Return was indorſed, nor any (*a*) Name of any Sheriff appeared on the Back of the Writ, *nec quod executio brevis præd' patet in quodam panello*, &c. but a Panel of the Jury with their Manucaptors was annexed and ſewed to the ſaid Writ; and alſo a *Tales* was awarded, and a Panel of the *Tales* annexed, but no Return of them, nor Name of Sheriff to it, but the *Poſtea* made Mention that they were returned by the Sheriff *per mandatum Juſtic'*. But it was moved that that would not ſerve, for the Sheriff ought to return the Jurors, and the *Tales* alſo; and where there is no Return, it is not remedied by the Statute of 18 *Eliz. cap.* 14. nor by any other Statute, but inſufficient Returns, or which want Form, &c. And therefore a notable Precedent was cited, and Judgment given in the Common Pleas, *Trinit.* laſt paſt, between *Harbert Barney* and others Plaintiffs, and (*b*) *Walkley* Defendant, *Trin.* 35 *Eliz. Rot.* 1251, which follows in theſe Words, *Poſtea continuato proceſſu inter partes præd' de placito prædict' per Jur' poſit' inde inter eos in reſpect' hic uſque hunc diem*, &c. *Et modo ad hunc diem venerunt tam prædict' H. B.* &c. *quam præd' J. W. per attorn' ſuos præd': Et ſuper hoc idem Johannes W. cur' hic dat' intelligi, quod quoddam breve de Venire facias hic duodecim*, &c. *inter partes præd' de placito præd', a die Sanctæ Trin. in tres ſeptiman' ultimo præterit', retornat' fuit album, & abſque aliquo indorſamento ſive ſcriptura ſuper dorſum ejuſdem brevis in ligulis Civitatis Glouc' annex', arraiat' inter brevia de tres ſeptiman' Sanctæ Trin' remanen' affilat', nullamque faciend' mentionem ſuper breve illud de aliquo Vicecomite, qui retorn' brevis illius warrant*

(*a*) Cr. El. 310. 2 Rol Rep. 210. 3 Bulſt. 220. Cr. Jac. 188, 443, 528. 8 Co. 162. b. 163. a. Cr. Car. 189. Cr. El. 466, 509, 704. Noy 115. Moor 65, 868. Yelv. 110. Palm. 152. 21 Jac. c. 13. 1 Rol. 204. Hob.

Harbert Barney's Caſe, Trin 35 El in Comm' Ban o.

(*b*) Cr. El. 310. 1 Rol. 204.

arrantizaret, nec quod executio patet in dict' panell' eidem brevi annex', petendo quod breve illud una cum panell' de ominibus Jur' & proceſſ. inde retornat' adnihilent', & pro nullo habeantur. Super quo brevi præd' ac dorſo ejuſdem brevis, una cum panell' annex', per Juſtic' hic viſ. & int' dict' allegatio dicti Johan' Walkeley comperta eſt vera. Ideo conſiderat' eſt, quod præd' breve de Venire fac', ac panell' eidem brevi annexat' necnon totus proceſſus ſuperinde retornat', adnihilentur, & pro nullo habeantur. Et ſuper hoc præd' H. B. &c. petunt breve Dominæ Reg' Venire facias de novo hic duodecim, &c. ad triandum exitum præd' alterius junctum, & eis conceditur: Ideo præceptum eſt vicecomiti, quod venire faciat de novo hic in craſtino Sanct' Trinit' duodecim, &c. per quos, &c. And note, that the ſaid Exception was taken after Verdict, as in our Caſe at Bar. And ſee the like Precedent, *Mich.* 32 *H.* 8. *Rot.* 112. in the Com. Pleas: But there *Curia adviſare vult.* And it was moved in the Common Pleas, 35 *Eliz.* in the ſaid Caſe of *H. B.* that the ſaid Writ on Examination might be endorſed and amended, *ſed non allocatur*; & *judicium ut ſupra.* And ſo it was prayed in 32 *H.* 8. but there *Curia adviſare vult.*

Mich. 34 & 35 Eliz.

In the King's Bench.

The Counteſs of RUTLAND'S *Caſe.*

IN Debt on a Bond of 500 *l.* brought by the Counteſs of *Rutland*: The Defendant pleaded to Iſſue, and it was found for the Plaintiff. And now in Arreſt of Judgment it was ſhewed, that one *Robert Moore* was returned on the *Venire facias*, and ſo named in the Diſtreſs, but in the Panel before the Juſtices of *Niſi prius*, by Miſpriſion he was named (*a*) *Robert Mawre*, and ſo on the *Poſtea*; upon which it was ſaid, that a Stranger who was not returned was ſworn and gave Verdict; for which Cauſe Judgment would not be given. But it was reſolved by the whole Court that if it could appear by Examination that his

(*a*) 1 Rol. 197. 8 Co. 162. b. Moor 762. 1 Rol. Rep. 100. 2 Rol. Rep. 168, 483.

right Name is *Robert Moore*, ſo that he is well named in
(a) 8Co.162.b. Mo. 762. 1Rol. Rep.200. 2Rol. Rep. 168, 483. Poſtea 43. a. 1 Rol. 197. the Panel on the (a) *Venire facias*, and alſo that he is the ſame Man who was returned, and was ſworn, there the *Poſtea* ſhould be amended. And to this Purpoſe, *vide* 9 *E.* 4. 14. by *Danby*, & 19 *H.* 6. 39. Tit. *Amendment Br.* 37. 27 *H.* 6. 5. by which Books it appears, That if one be well returned in the Panel of *Venire facias*, and miſnamed in the *Diſtringas*, or *Habeas Corpor'*, That it was not amendable; but the Proceſs againſt the Jurors was diſcontinued: But
Cr. El. 57,222. 32 H.8.cap.30. 18 El. c. 14. 21 Jac. cap.13. Cr. Jac. 457, 458. Cr. Car. 278. 1Rol.404. at this Day after Verdict Judgm. ſhall not be therefore ſtayed for all Diſcontinuances are remedied by the Statute of 32 *H.* 8. and 18 *Eliz.* But at this Day, if a Juror be miſnamed in the Panel of *Venire facias*, although he be well named in all the ſubſequent Proceſs, it cannot be amended. And ſo it was adjudged *M.* 35 & 36 *Eliz.* in the King's Bench in *Codwel's* Caſe; and afterwards the Sheriff was examined, and on Examination it appeared that the true Name of the Juror was *Robert Moore*, and that the ſaid *Robert Moore* who was returned appeared and gave his Verdict; and thereupon for the Reaſon aforeſaid, the Record of the *Poſtea* was amended by the Opinion of the whole Court, viz. *Popham* Chief Juſtice, *Clench*, *Gawdy*, and *Fenner*.

Mich. 35 & 36 Eliz.

In the King's Bench.

CODWEL'S *Caſe.*

1 Rol.197, 198. Cr. El. 319. Goldsb. 184, 185. Moor 762. Cr.Jac.457,458. Cr. Car. 203. Palm. 103, 104. IN an Appeal of Mayhem between *John Codwell* Plaintiff, and *Thomas Parker* Defendant, the Parties came to Iſſue, and the Jury found for the Plaintiff; and now it was moved in Arreſt of Judgment, that there was Variance between the Panel of the *Venire facias* and the *Diſtringas* and *Poſtea* in the Name of one of the Jury, who appeared and gave Verdict; for in the Panel of the *Venire facias* he was named *Palus Cheal*, and in the *Diſtring'* and *Poſtea*

Poſt. he was named *Paulus Cheale*; and becauſe the Name of the Juror was (*a*) miſnamed in the *Venire facias*, and eſpecially in his (*b*) Chriſtian Name, therefore the Judgment was arreſted; but if he had been well named in the Panel of *Venire facias*, and miſnamed on the *Diſtringas* or in the *Poſtea*, there on Examination it ſhould be amended.

(a) 1 Rol. 197. 198. 1 Jones 448, 449. Cr. Car. 32, 203. 563. Cr. El. 57, 222, 258, 866. Cr. Jac. 28, 116, 353, 354, 396, 457, 458, 653, 654. 1 Rol. Rep. 1 Sid. 66. 1 Keb. 375. Hutt. 81. 3 Bulſt. 179, 180. Hob. 328. 1 Leon. 278. Owen 61, 62.

(b) Cr. El. 256.

Mich. 37 & 38 Eliz.

In the King's Bench.

NICHOLS's *Caſe.*

Hamberlain brought Debt againſt *Nichols* on a ſingle Bill; the Defendant pleaded Payment without Acquittance, on which they were at Iſſue, and found for the Plaintiff; and although Payment without Acquittance is no Plea, yet Iſſue is joined on a Thing not material; for if the Defendant hath paid the Sum without Acquittance, yet the Bill remains in Force: But foraſmuch as there was Iſſue joined on an Affirmative and a Negative, which Iſſue is found for the Plaintiff, it was expreſly helped by the Statutes of 32 *H.* 8. & 18 *Eliz.* and on that the Plaintiff had Judgment; on which Judgment a Writ of Error was brought on the new Statute, and there on good Conſideration the Judgment was affirmed. *Quod nota.*

Jenk. Cent. 257. Cr. El. 157, 455. 697, 716, 884. 1 Brownl. 225, 229, 232. Moor 12, 692. Dy. 6. pl. 3. 1 Rol. 243. pl. 4. Cr. Car. 27, 78. Cr. Jac. 86, 377. 435, 447. Noy 85, 86. Latch. 158. 1 Jones 140, 141. Hob. 68, 69, 113. 1 Keb. 5. pl. 13. Winch. 76. Hutt. 54.

(a) 27 El. c. 8.

Mr. 301, 302. O. Benl. 127. Hard. 2, 3, 40. Lane 81. Stile 198.

Mich. 38 & 39 Eliz.

BOHUN's *Case.*

Amendment of Fines.

IN 32 *H.* 8. *Grey* and *Elizabeth* his Wife being ſeiſed in the Right of the ſaid *Elizabeth*, of the Manor of *Empoles* in *Weſthall* in *Suffolk*, in the ſame Year levied a Fine thereof to *Nicholas Bohun* Eſq; and his Heirs, by the Name of the Manor of *Empoles*, and of a great Number of Acres of Land, Meadow, &c. according to the common Form of Fines; and the Manor and Tenements were valued at 20 Marks *per annum*, ſo that the Fine in the Hamper was 26 *s.* 8 *d.* which was endorſed on the Writ of Covenant; and always the Fine *pro licentia concordandi* (which is (*a*) call'd the King's Silver, or the Poſt-Fine) is the Fine in the Hamper, and half the ſaid Fine more. As in this Caſe the Fine in the Hamper was 26 *s.* 8 *d.* and the half is 13 *s.* 4 *d.* in all amounting to 40 *s.* and yet the Clerk made the Entry of the King's Silver in this Form, *Nicolaus Bohun armiger dat Dom' Reginæ* 40 *s. pro licentia concordandi, &c. in placito conventionis* of ſo many Acres of Land, Meadow &c. leaving out the Manor, and following the other Words. And for this Miſpriſion *Aldam* who was Couſin and Heir of the ſaid Woman, brought a Writ of Error in the King's Bench, and the Tranſcript of the Fine certified. And Error aſſigned (amongſt others) in the ſaid Point, becauſe the King's Silver was not paid as well for the Manor as for the Tenements. And after that, the Judges of the Common Pleas were moved to amend this Fine in open Court; and becauſe it appeared to them on Examination and Sight of all the Parts of the Fine, that it was only the Miſpriſion of the Clark who entered the King's Silver, and that the ſaid Sum of 40 *s.* was in Truth the Fine as well for the Manor as for the Reſidue. And always the Value entered on the Back of the Writ of Covenant is the Warrant for the Entry of the King's Silver; and altho' the Tranſcript of the Fine was removed by Writ of Error; yet foraſmuch as the

(*a*) Antea 39. a.

Body of the Record did remain with them, they unanimouſly agreed, That the ſaid Entry ſhould be amended, and made in a Writ of Covenant of the Manor aforeſaid, and of all the Acres, *&c.* as it ought to be. And afterwards on Diminution alledged in the Omiſſion of the ſaid Manor, in the Entry of the K's Silver, a Writ was directed to this Purpoſe to the Ld. *Anderſon*, who one Day this Term moved all the Juſtices of Serjeants Inn in *Fleetſtreet* to know their Opinions concerning the ſaid Amendm. in this Caſe, pending the ſaid Writ of Error. An it was reſolved by *Poph.* Ch. Juſt. of *Engl. Periam* Ch. Baron, *Clark*, *Walmſley*, *Fenner*, *Owen* and *Ewyns*, that the ſaid Entry of the King's Silver ſhould be amended, and that pending the Writ of Error. Alſo where the Writ of Covenant ſhould be *Teſte meipſo*, the Writ was, *Dede meipſo*, which was inſenſible and vitious; and that was alſo amended by all their Opinions. Poſtea 39. a. 2 Sid. 93. Poph. 102.

Note Reader, theſe Precedents and Reſolutions of the Juſtices following in the like Caſes were ſhewed to the ſaid Juſtices before they reſolved of the principal Caſe.

In *Eſſex*, *Dowling*'s Caſe, *&c.* Fine levied *Hill. 6. E. 6.* certified in a Writ of Error, *Mich.* 24 & 25 *Eliz.* and certificate by Writ of *Certiorari Paſch. 26 El. & Trin. 26 El. ex aſſenſu omnium Juſticiar' de Reg' Banco, & Com' Banco, & Baron' de Scaccario*, pending the Writ of Error, Proclamations endorſed *ſup' pedem finis* were amended according to the Proclamations on the Note of the Fine remaining with the *Chirographer, ut patet per record'*. The Juſt. of the K's Bench were then *Wray*, *T. Gawdy*, *Ayloffe* and *Clench*; and the Juſt. of the Com. Pleas then were *Anderſ. Mead*, *Windham*, and *Periam*, and the Barons of the Exchequer were *Manwood* and *Shute*. Dowl. Caſe. Tr. 26. El. by all the Juſtices and Barons. Godb. 103.

2. In *Kent*, *Kettle*'s Caſe. The Return of the Writ of Covenant was, *Oct' Purif.* 31 *H.* 8. and in Truth was ingroſſed *Trin. ſequen'* but was entered thus, *ſc. & poſt conceſſ. & record' in craſt' Sanct' Trin', ann.* 30 *H.* 8. where it ſhould be 32 *H.* 8. and thereupon a Writ of Error was brought; and pending the Writ of Error, the Juſtices of the King's Bench, by the Reſolution of *Wray*, *Gawdy*, *Clench* and *Shute* (*ſedente Curia*) the Record was amended in theſe Words, *Et poſtea conceſſ. craſtin' Trin'* 32. And on that *Regula intratur in Reg' Banco Term. Mich.* 27 & 28 *Eliz.* And it appears by the ſaid Rule, that the Juſtices of the Com. Pleas, that is to ſay, *Anderſon*, *Periam*, *Windham* and *Rhodes* aſſented to it; and *Rhodes* ſaid, that there was a good Precedent in 30 *H.* 8. *ubi pes finis* was amended by the Note and the Proclamations, *&c.* Kettle's Caſe. Mich. 27. & 28 El. by all the Juſtices.

3. *Morgan*'s Caſe in the County of *Oxford*, *Certificat' notæ Judicis*, ſc. *Concordia partium fuit in his verbis*, *In Præcipe de* Morgan's Caſe, Hill. 38 El. per Cur. de Com. Banco.

de duabus partibus Rector', & de duabus part' tenem', & per vitium Clerici ſcriptor' in concordia, deforcian' recognovit partem ultim' quam, &c. & pes finis, & nota cum Chirographar' recte ingroſſant', viz. recognovit partes quas, ut illas quas, &c. Et penden' ſuper hoc breve de errore, Hill. 38. *Eliz. emendatur certificatio Judicis per notam & pedem finis, per Curiam*, before Judgment given in the King's Bench; and thereupon the Plaintiff in the Writ of Error moved the Court of Common Pleas, that foraſmuch as the Writ of Error was depending, that the Fine might be *in ſtatu quo prius* before the Amendment, as it was certified before the Writ of Error certified. And the Juſtices of the Common Pleas, *ſcil. Anderſon, Walmeſley, Beaumont* and *Owen* denied the Motion, and awarded that the Amendment ſhould ſtand, although it was after the Writ of Error brought.

Down's Caſe, Mich. 38 & 39 Eliz. per Cur' de Com'Banco.

4. In *Suffolk*, *Down*'s Caſe, *Mich.* 38 & 39. by the Motion of *Williams* Serjeant at Law *proclam' pedis finis* were amended *per proclam' notæ, in his verbis, ſuper pedem finis proclam'* was indorſed to be made 30 *Julii*, which was after *Trin.* Term ended; & *ſuper notam finis fuit* 30 *Junii*, and well and duly done, & *emendatur per Curiam* after Writ of Error brought; and that aſſigned for Error. And ſo in the principal Caſe the Roll of the Entry of the King's Silver was amended (a Writ of Error depending and that aſſigned for Error) according to the Writ of Covenant, the Note, the Foot, and the Certificate of the Judge in theſe Words (*de manerio de Empoles cum pertinentiis ac*) which by the Negligence of the Clerk in the Entry of the King's Silver were omitted in the Roll and are fully extant in the Writ of Covenant, Note, Foot and Certificate of the Judge: And becauſe it appeared that the whole Sum was paid to the Queen as well for the Manor as for the Reſidue, and ſo no Prejudice to the Queen, it was amended, *ut ſupra.*

Payn's Caſe, Mich. 33. & 34 Eliz. per Cur. de Com'Banco.

5. *Mich.* 33 & 34 *Eliz.* between *Pain* and *Covert*; the Records (before Amendment) were *in Com' Suſſex*, and amended, and made *Kanc'* as the Truth was; & *duo alii fines, M.* 33. & 34 *Eliz.* were amended, and *pro civitate Eborum*, made *Eborum.*

Wealch's Caſe.

6. *Suſſex*, *Wealch*'s Caſe, *Cognitio Judicis*, the Town in which, &c. was to be *Salehurſt*, as the Truth was, and the Writ of Covenant, Note and Foot were *Calehurſt*, & *emendatur*, and made *Salehurſt per Curiam. Et notandum eſt, Quod tales emendationes per mandatum Curiæ, intrantur in dorſo Recordi per Regulam Curiæ.*

Paſch. 41 Eliz.

IN THE

KING's BENCH.

FREEMAN's *Caſe.*

ERror by *Smith* againſt *Freeman* in a Recovery in Waſte: The Writ was in Recital of the Statute of (a) *Glouceſter, Quod nullus faciat vaſtum, venditionem* & (b) *deſtrictionem, &c.* where it ſhould be *deſtructionem.* And in that Error was aſſign'd, and it was prayed that this original Writ might be amended, being but the Miſpriſion of the Clerk, who hath miſtaken a Word in the Statute of *Glouceſter*, on which the Writ was grounded. And the Miſpriſion was only in a Letter, that is to ſay, *deſtrictionem* for (c) *deſtructionem.* And the whole Court on good Debate and Conſideration at two ſeveral Times reſolved: 1. That it was Matter of Subſtance; for *diſtrictio* is a Latin Word, and alters the Senſe of the Statute. 2. That it could not be (d) amended by any Statute, for Matter of Subſtance in an original Writ is not remedied by any Statute, but Matter of Form only.

Cr. El. 462. 8 Co. 163. a.

Conſtruction de Statutes.

(a) 6 E. 1. Stat. de Glouceſt. cap. 5. 2 Inſt. 299, 300, &c.

(b) F. N. B. 55. c.

(c) 2 Bulſt. 51. Cr. El. 462. Hutt. 56, 57.

(d) 2 Bulſt. 51. Cr. El. 462, 644.

Note well Reader, on Conſideration of the Statutes of (e) 14 *E.* 3. *cap.* 6. *Stat'* 1. 9 *H.* 5. *cap.* 4. 4 *H.* 6. *cap.* 3. 8 *H.* 6. *cap.* 12. 32 *H.* 8. *cap.* 30. & 18 *Eliz. cap.* 14. If a Writ original at this Day wants Form, or contains falſe Latin, or varies from the Regiſter in Matter of Form after Verdict, no Judgment ſhall be ſtayed or reverſed. But if it wants Subſtance as in the Caſe at Bar, although it be by Miſpriſion of the Clerk, it is not remedied by

(e) 8 Co. 157. a. 158. a.

5 Geo. cap. 13.

by any Statute. *Vide* 3 *E.* 6. 86. 10 *E.* 3. 482, 553. 41 *E.* 3. 14. 45 *E.* 3. 6. 4 *H.* 6. 16. 7 *H.* 6. 40. 21 *H.* 6. 8. 40 *Aſſ.* 26. 11 *H.* 6. 34. 27. *H.* 6. 6. 27 *H.* 6. *Amendment* 34. 28 *H.* 6. 8. 2 *H.* 7. 11. 9 *H.* 7. 16. 9 *H.* 7. 19. 34 *H.* 6. 26. 35 *H.* 6. 10. 30 *H.* 6. 4. 8 *E.* 4. 4. 10 *E.* 4. 12. 11 *E.* 4. 14. 22 *E.* 4. 21, 47. 13 *H.* 7. 21. 14 *H.* 7. 13. *Vide Mich.* 3 *E.* 6. *Bendloes*, the Juſtices of the Common Pleas in a Writ of Partition, added the Word *oſtenſurus*, (*a*) which was omitted: And in a Writ of Aiel they amended this Word (*b*) *Ave*, and made it *Avie*.

(*a*) 8 Co. 160. a. 1 Ander. 24. Moor 5. Dall. 5. pl. 9. N. Benl. 33. pl. 53. O. Benl. O. Benl 3. pl. 9.

3. pl. 9. (*b*) 8 Co. 159. b. Moor 5. 1 Anderſ. 24. N. Benl. 33. pl 53.

Trin. 41 Eliz.

In the King's Bench.

GAGE's *Caſe.*

Jenk. Cent. 258. Co. Ent. 250. pl. 9. Noy 171. Moor 571. Cro. El. 740. Salk 52, 53.

IN a Writ of Error by *Gage* againſt *Tawyer* to reverſe a Fine levied 4 *Eliz.* and aſſigned for Error that the Writ of Covenant bore *Teſte* 24 *Aprilis*, returnable 15 *Paſch.* (which in Truth was the 15 Day of *April*) and ſo the Return before the *Teſte*. And it was reſolved by the whole Court that it ſhould be amended; for a Fine and common Recovery are but common (*a*) Aſſurances, had by the mutual Conſent of the Parties, and therefore ſuch Miſpriſions might be amended. But in other Actions no Amendment ſhould be in ſuch Caſe: And it was ſaid, That in 18 *Eliz.* between (*b*) *Norris* and *Braybrook* a Writ of Error was brought to reverſe a Recovery in 19 *H.* 8. and the *Teſte* was a Day after the Return; and becauſe it appeared, that it was the Miſpriſion of the Clerk, in Caſe of common Recovery, it was amended, *Vide* 11 *H.* 6. 2. *b.*

(*a*) Antea 40. b. Jenk. Cent. 257. Cr. Car. 270. Poph. 23. Poſtea 46. a. 1 Co. 15. b.

(*b*) Raym. 71.

Trin.

Trin. 41 Eliz.

In the Common Pleas.

COOK's *Case.*

CHallenor brought a *Formedon* againſt *Cook* of the Manor of (*a*) *Iſfield* in the County of *Suſſex*. The Tenant pleaded in Bar a common Recovery againſt the Donee in Tail of the ſaid Manor; The Plaintiff pleaded, *Nul tiel Record*, upon which they were at Iſſue; And the Record was *Iffield* either by the Negligence of the Clerk, or by Corruption by drawing a Stroke, and making an *ſ.* an *f. ſc. Iſfield* for *Iffield*. And the Court was moved to amend it; and it was reſolved, That if it could (*b*) appear to them, that it was the Miſpriſion of the Clerk, or corrupted after, that it ſhould be amended. And to induce the Court to it, the Tenant ſhewed, that the Recoveror enfeoffed him who was Tenant in Tail by Deed, which recited the Recovery by the Name of *Iſfield*, and he enfeoffed him by the ſame Name, and divers Conveyances immediately after the Recovery, and all by the true Name of *Iſfield*. And the Court agreed that it ſhould be amended, and the rather that it was in a common Recovery which is ſuffered by Aſſent of the Parties for (*c*) Aſſurance of Land. And thereupon it was amended, and Judgment given againſt the Demandant.

(*a*) 2 Brownl. 236. 1 Bulſt. 7. Noy 1.

(*b*) 2 Brownl. 236. 1 Bulſt. 7.

(*c*) Antea 40. b. 45. b. Jenk. Cent. 257. Poph. 23. Cr. Car. 270. 1 Co 15. b. Noy 1.

Caſes

Caſes of Pardons.

Mich. 35 & 36 Eliz.

In the Star-Chamber.

FRANKLIN's *Caſe.*

1 Ander. 131, 132. 3 Inſt. 234.

A Queſtion was referred to the Conſideration of *Coke* the Queen's Solicitor General, out of the Court of Star-Chamber, between *Downing* Pl. and *Franklin*, *Eden* and others Defendants, on the general Pardon, 19 *Feb* 35 *Eliz.* and the Caſe was, That *Downing*'s Bill was exhibited into the ſaid Court five Years before the laſt Parliament, for Riots, Routs, &c. and what Thing was pardoned by the ſaid general Pardon was the Queſtion: And it depended on two Branches of the ſaid Act, *ſcil.* "And alſo "except all Penalties, Forfeitures now due, accrued or "grown, or which ſhall or may be due, accrue or grow to "the Queen's Majeſty by Reaſon of any Offence, Miſdemea-"nor, or Contempt, and whereof and for the which any "Action, Bill, Plaint or Information at any Time within "eight Years next before the laſt Day of this preſent Seſ-"ſion of Parliament, hath been or ſhall be exhibited, com-"menced, or ſued, and ſhall be there the laſt Day of this "Seſſion of Parliament depending or remaining to be proſe-"cuted." And next following there is another Exception, *ſcil.* "And alſo excepted out of this general and free Par-"don, all Offences, Contempts, Diſorders, Covins, Frauds, "Deceits, and Miſdemeanors, &c. whereof or for the "which any Suit by Bill, Plaint, &c. within four Years "next before the laſt Day of this Seſſion of Parliament, is "or ſhall be commenced, or exhibited: And on Conſidera-

tion

tion of theſe two Branches, the Solicitor General certified, That the Fine due to the Queen was excepted, and the Plaintiff or the Queen's Attorney might proceed for the Fine which is excepted, and that the Queen ſhould have it, for without Proſecution the Queen could not have the Fine, nor the Party his Coſts. *Et* (a) *quando Lex aliquid alicui concedit, concedere videt' & id, ſine quæ res ipſa eſſe non poteſt.* But he certified, that the Impriſonment, and all the corporal Puniſhment in the ſaid Caſe were pardoned. For in the firſt of the ſaid two Exceptions the Offence it ſelf is not excepted, but the Forfeiture, Penalty and Profit due to the Queen. And therefore the Impriſonment or any other corporal Puniſhment is not excepted, for that is not included within theſe Words, *Forfeiture, Penalty, or Profit.* But if the Bill had been exhibited within the four Years, then the Offence it ſelf being excepted, by Conſequence all Incidents (b) or Appendants thereto, as well corporal, as pecuniary, are excepted. And therefore in ſuch Caſe nothing is pardoned: Which Certificate oftentimes ſince hath been confirmed by the Opinion of *the Court of Star-Chamber.*

(a) 5 Co. 12. a. 115. b. 12 Co. 13, 130. Co. Lit. 56. a. 153. a. 2 Inſt. 306. Cawly 246. Moor 218.

(b) 6 Co. 13. b. Larch. 81. Palm. 412. Hob. 81, 82. 2 Inſt. 236. Cr. Jac. 207. 1 Brownl. 211.

Hardres 370. Poſtea 51. a. b. Jenk. Cent. 258. Moor 394, 599. Yelv. 126. Plo. 401. a. Cr. El. 72.

Hill. 39 Eliz.

In the Star-Chamber.

GILBERT LITTLETON'S *Caſe.*

BEtween *Gilbert Littleton* Eſq; Pl. and the Lord *Dudley* and others Def. in the Star-Chamber, the Caſe was ſuch; At the laſt Parliament which began 19 *Feb.* 35 *Eliz.* in the general Pardon is ſuch Exception: "And alſo except-"ed out of this general Pardon all Offences, &c. whereof, or "for the which any Suit by Bill, &c. at any Time within four Years

3 Inſt. 234. Hard. 370.

" Years next before the last Day of this present Parliament " is, or shall be commenced or exhibited in the Court of " Star-Chamber, and now is, or the last Day of this Session " of Parliament shall be there depending. And the Bill was exhibited by *Gilbert Littleton, Term' Hillar'* before the Parliament, and Process awarded returnable *Term' Pasch'* next following, which was after the Parliament; And whether this Suit should be said depending before the Return of the Process was the Question. And first, it was objected, that the Words of the Exception are, *Suit by Bill depending*, and it cannot be said Suit till the Process be returned. 2. It was observed, That in the next preceding Exception concerning Suits commenced within eight Years, there the Conclusion is, *Depending, or remaining to be prosecuted*, which Words, *or remaining to be prosecuted*, as it was said, extend to Bills not depending, *scil.* when the Process is not returned, but no such Words are in this Exception. And to prove that the Bill was not depending before the Process returned, the Defendants Counsel resembled it to Writs at the Common Law, where divers Books were cited, to prove that original Writs are not in Law depending (*a*) before their Returns, 21 *E.* 4. 55. *a.* a Writ it brought as soon as it is sealed, but it is not depending until it be returned, (*b*) 18 *H.* 8. 5. *a. acc.* But it was answered and resolved, That there was a great Difference between an original Writ purchased out of the Chancery, and returnable in the Common Pleas, or King's Bench for there inasmuch as the Original comes out of another Court, the Common Pleas or King's Bench, hath not any Record before the Return there of: But in the Case at Bar, the Bill is exhibited in the Star-Chamber, and Process issues out of the same Court, and is returnable in the same Court; and therefore the Suit by Bill shall be said depending before the Return, or serving of the *Subpœna*. And it was said, that Suit by Bill depending, and Bill depending are all one; for the Bill is, *Origo rei & caput sectæ, & res denominatur a principaliori parte:* And the Attorney General said, That where an original Writ is purchased out of the Chancery returnable in the Common Pleas, or King's Bench, in such Case after the Writ shall be returned, the Writ shall be said pending from the Day of the (*c*) *Teste* of it. And if the Tenant alien before the Return, and after the *Teste* it shall be said an Alienation pending the Writ; or if the Def. purchases another Writ before the Return of the first Writ, it shall be said purchased pending the first Writ. And it is said in 9 *H.* 6. 54. that where a Writ of Covenant (*d*) is purchased to levy a Fine, and before the Return, *Dedimus potestat'* recites, *cum breve nostr' de conventione pendeat*; and yet the Writ of Covenant then is not returned;

(*a*) 2 Inst. 329. Cr. El. 261. Hob. 224. Hutt. 4. 10 E. 4. 19. a. 2 Sid. 94. Postea 48. b. 7 Co. 30. a. 3 Keb. 172. 9 H. 6. 51. b. 54. b.

(*b*) Cr. El. 677. Br. Estrepment 1.

Nota

(*c*) 2 Sid. 94. 9 H. 6. 54. b.

(*d*) Cr. El. 677. Cr. Jac. 11.

returned; and ſo is the common Experience at this Day. *Vide* 2 *E.* 4. 11 *b.* If (*a*) a *Quare Impedit* be delivered to the Sheriff in the Court of Common Pleas to be executed, it is pending to this Purpoſe, that the Plaintiff may have a Pohibition for Suit for the ſame Cauſe in the Spiritual Court: And a Man may purchaſe his original Writ, and at the ſame Time a Writ (*b*) of Eſtrepement. Alſo the Words of the Exception were obſerved, "*ſc.* Whereof any Suit by Bill is, or ſhall be commenced, *&c.* and ſhall be depending the laſt Day of this Parliament. In which this Word (*is*) is to be intended, depending 19 *Feb.* which was the firſt Day of the Parliament; but (*ſhall be commenced*) ought to be of Neceſſity after the ſaid 19 Day of *Feb.* which is always out of Term. And becauſe it appears that the Makers of the Act intended that the putting in of the Bill onto the Star-Chamber after the 19 Day of *Feb.* and before the ſaid laſt Day, ſhould be ſaid depending; and ſo it appears that the ſaid Words in the preceding Branch, *ſcil. Depending or remaining to be proſecuted*, are all one in Effect; therefore it was concluded, That in the Caſe at Bar, the Bill ſhould within the true Intendment of the ſaid Exception be ſaid (*c*) depending. And ſo it was reſolved by the Juſtices on a Conference had between them. And thereupon Sentence in the Star-Chamber did (*d*) proceed againſt the Defendant in the ſaid Bill.

(*a*) Br. Prohibition 10. Hutt. 4. F. N. B 43. g. Fitz. Prohibition. 7.

(*b*) 19 H. 8. 5. a. 18 H. 8. 5. a. Br. Eſtrepment 1. F. N. B. 61 d. e. 2 Inſt. 328, 329.

(*c*) Poſtea 48. b.

(*d*) 2 Rol. Rep. 485.

Paſch. 42 Eliz.

In the Star-Chamber.

Drywood's *Caſe.*

Drywood was Plaintiff againſt *Appleton* and others Defendants in the Star-Chamber for Riots, and Routs, and other Miſdemeanors; which Bill was brought before the laſt General Pardon in 39 *Eliz.* and before the ſaid Pardon the Plaintiff died. And afterwards the Queen's Attorney informed for the ſame Offences againſt the Defendants, and proſecuted

3 Inſt. 234.

Hard. 368.

prosecuted on the first Suit: And now a great Question was moved, whether the said Offences were pardoned or not by the said general Pardon. And it is to be known, that the said Bill was brought four Years and more before the last Day of the said Parliament, and within the eight Years. And the Doubt was conceived on these Words of the Exception of the said Pardon, *scil.* "And now is, or the last "Day of this Session of Parliament shall be there depend-"ing, or remaining to be prosecuted: And it was said, That although this Suit was not depending, because the Pl. who prosecuted for the Queen (for every Suit in the Star-Chamber is for the (*a*) Queen, and she may pardon it) was * dead; yet it was said that these Words (*or remaining to be prosecuted*) ought to have Construction in Cases where no Suit is depending, and yet may be prosecuted, and that is when the Plaintiff dies, or will not prosecute, then the Queen's Attorney may prosecute for the Queen. But it was resolved by the two Chief Justices and the Chief Baron, that the said Offences were pardon'd, for these Words, *Or remaining to be prosecuted*, ought to be construed, *to be prosecuted by the Party*; And the said Words, *remaining to be prosecuted* are added, to remove a Scruple which some conceived, That a Bill should not be said depending till the Process be returned, although in Judgment of Law, the Bill in such Case is said (*b*) to be depending.

(*a*) Postea 50.b. 51. a. 2 Bulst. 182. 2 Inst. 238. * Hard. 398.

(*b*) Antea 48.a.

Mich.

Mich. 39 & 40 Eliz.

In the King's Bench.

VAUGHAN's *Case.*

IN a Writ of Error between *Hall* and *Vaughan* in a Writ of Entry in the *Quibus* brought in *Wales*: The Def. pleaded *Non diſſeiſivit*, and pending this Plea the general Pardon in 35 *Eliz.* was made, by which all Fines, Amercements, Contempts, &c. were pardoned, &c. and after divers Continuances the Iſſue was found for the Demandant, and Judgment given, *ſed non in miſericordia, quia* (a) *pardonatur*. And the principal Error which was aſſigned was, becauſe the Defendant ought to have been amerced, becauſe the general Pardon did not diſcharge the Amercement; for it was ſaid, that the Wrong, or the Diſſeiſin was not the Cauſe of the Amercement, but the Delay of the Plaintiff; for if the Defendants come (b) the firſt Day and render to the Demandants, they ſhall not be amerced, as 14 *E.* 3. *Amerciament* 16. 22 *E.* 3. 1 & 2. 8 *R.* 2. Tit. *Amerciament* 26, and divers other Books are agreed. And a Caſe was cited in the Common Pleas, *M.* 15 & 16 *Eliz.* where a *Præcipe* was brought againſt an (c) Infant, and pending the Plea he came of full Age, it was adjudged he ſhould be amerced for the Delay, as it was urged after his full Age. So in the Caſe at Bar, foraſmuch as there was a Delay as well after as before the Pardon, and the Amercement was wholly for the Delay, for this Cauſe the Pardon did not diſcharge it. But the Court reſolved, the Judgment ſhould be affirmed. And in this Caſe theſe Points were reſolved.

Jenk. Cent. 258. Moor 394.

(a) Lane 71.

(b) 8 Co. 61. b. Cr. El. 65. 2 Sand 227. Co. Lit. 126. b. Cr. Car. 564. Plowd. 42. b. 1 Rol. 212.

(c) 1 Rol. 215. Co. Lit. 126 b. 127. a. Mo 394.

1. That the original Cauſe of the Amercement in the Caſe at Bar was the Wrong and Contempt of the Tenant that he did not render the Land to the Demandant, as he was commanded by the K's Writ; and altho' the Amercement cannot be impoſed, nor the Queen intitled to it before the Judgment (becauſe by the Judgment the Wrong is diſcerned) and al-

The Reſolution of the Court.

(*a*) 1 Brownl. 211. Yelv. 126. Antea 47. a. 6 Co. 13. b. Latch. 81. Palmer 412. 3 Inst. 236. Hob. 81, 82. Hardr. 370. Co. Lit. 126. b. Moor 394, 599. Cr. Jac. 207. Cr. El. 72. Jenk. Cent. 258 (*b*) Cr. El. 72. 37 H. 6. 21. (*c*) Latch. 22. 82, 141. Godb. 288. 6 Co. 79. b. Postea 50. a. Kelw. 198. a. (*d*) 2 Bulst. 54. 3 Keb. 405. (*e*) 27 H. 8. c. 26. 2 Bulstr. 54. 2 Sand. 40. Plowd. 126. b. Vaugh. 396. (*f*) Co. Lit. Plowd. 42. b.

although the Pardon comes before the Judgment, yet the (*a*) original Cause of the Amercement being pardoned, the Amercement it self by Consequence is pardoned, as in *Cole*'s Case in *Plow. Com.* 401. *a.* And in *Quatermoigne*'s Case in 37 (*b*) *H.* 8. 21. where it is agreed, that a general Pardon ought to be taken (*c*) most beneficial for the Subject, and most strong against the King.

2. It was resolved, That all Statutes of Jeofails extend to (*d*) *Wales*, for the Statute of 27 (*e*) *H.* 8. hath made it Parcel of *England*; and afterwards the Judgment was affirmed. Note, he who commits a Wrong, and at the (*f*) first confesses it, and obeys the King's Command by his Writ shall not be amerced; for *prudenter facit, qui præcepto legis obtemperat*: But every one who commits a Wrong, and being commanded by the King's Writ, *quod juste & sine dilatione reddat, &c.* and he injustly maintains the Wrong on Record in the King's Court, and with great Delay compels the Demandant to recover it by Course of Law, *peccatum peccato addit, qui culpæ quam fecit patrocinia defensionis adjungit*, and therefore he shall be amerced.

126. b. 8 Co. 61. b. 2 Sand. 227. Cr. El. 65. 1 Rol. 212. Cro. Car. 564.

Hill. 41 Eliz.

In the Exchequer.

WYRRAL's *Case.*

3 Inst. 234.

Hill. 40 *Eliz. Rot.* 188. the Case was such; *Thomas Wyrral* and *Jasper Bosvile* were bound to *Henry Thwaits* in a Recognisance in the Nature of a Statute-Staple 15 *Feb.* 35 *Eliz.* of 500 *l.* And afterwards the said *Thwaits* was outlawed in the County of *York*, 8 *Octob.* 38 *Eliz.* and afterwards the general Pardon at the last Parliament 39 *Eliz.* was made. And whether this Debt was pardoned or not was the Question now in this Term in the Exchequer. And it consisted on two Exceptions in the said Pardon, *scil.* "And "also except out of this Pardon all Debts which were or "be due to our Sovereign Lady the Queen, *&c.* or to "any

" any to her Uſe, by any Condemnation, Recogni-
" ſance, Obligation, or otherwiſe, &c. And alſo except out
" of this Pardon, all Goods, Chattels, Debts, Actions and
" Suits already forfeited, &c. by Reaſon of any Outlawry,
" and whereof her Majeſty by her Highneſs's Letters Pa-
" tents hath before the laſt Day of this preſent Seſſion made
" any Grant, Covenant, or Promiſe to any Perſon or Per-
" ſons." And it was reſolved, that by the laſt Exception it is proved, that the Intention of the Queen was not to include (*a*) Debts which accrued to her by Outlawry within the firſt Exception; for there is a ſpecial Saving, and in a ſpecial Manner for them by the laſt Exception. Alſo the general Pardon is to be taken moſt (*b*) beneficially for the Subject, and moſt ſtrong againſt the Queen.

(*a*) Lit. Rep. 87. Swinb. 303.
(*b*) Antea 49. b. Kelw. 198. a. b. 6 Co. 79. b. Latch. 12, 82. 141. Godb. 288.

Trin. 41 Eliz.

In the King's Bench.

BIGGIN's *Caſe.*

IN Appeal between *Shugborough* and *Biggins* the Defendant was found guilty of Manſlaughter; and the Queſtion was, if the Queen might pardon the Burning of the Hand. And it was objected, That the Appeal is the Suit of the Party; and now by the Statute of 4 *H.* 7. *cap.* 13. the Burning of the Hand is Parcel of the Puniſhment. As if it was enacted, That he who is attainted in an Appeal of Mayhem, ſhall have Judgment of Death; in that Caſe if one was attainted in an Appeal of Mayhem, the Queen could not pardon the Execution of Death, becauſe it is the Puniſhment of the Offence at the Suit of the Party. But on Conference had with divers other Juſtices it was reſolved, That the Queen might (*a*) pardon the Burning of the Hand in an Appeal, and that for two Reaſons.

Moor 571. Cr. El. 632, 682. 3 Inſt. 114.

(*a*) Dyer 261. pl. 26. Raym. 370. Hob. 294. Moor, 571. 3 Inſt. 237. Cr. El. 465, 632, 682.

1. It appears by the ſaid Statute of (*b*) 4 *H.* 7. that at the Common Law a Man who had once had the Benefit of his (*c*) Clergy ſhould have it again, and ſo *in infinitum*

(*b*) 4 H. 7. c. 13. Raym. 370. Stanf. Cor. 124. c. Hob. 294.
(*c*) Stanf. Coron. 124. c.

which was remedied by the said Act; so that the Burning of the Hand was to no other Purpose but to (*a*) signify to the Judge whether he had had his Clergy before or not.

(*a*) Raym 370. Hob. 294.

(*b*) Raym. 370. Hob. 294.

2. The Burning of the Hand is not any (*b*) Parcel of the Judgment, for then the Queen could not pardon it, because the Plaintiff hath Interest in the Judgment, and for this Cause the Case of Mayhem which was put on the other Side was well agreed. And so the Doubt in *Ellen Lamb*'s Case, 3 *Eliz. Dier* 201 (*c*) & 202. and in *Musgrave*'s Case in 9 *Eliz. Dier* (*d*) 261. well explained. But there it is said, that the Queen cannot pardon the Imprisonment, for that is Parcel of the Execution of the Plaintiff in the Appeal. And *Taverner*'s Case, 15 *Eliz. Dier* (*e*) 323. was agreed by all, That the Queen may pardon the corporal Punishment in Case of (*f*) Forgery, because all Suits in the Star-chamber are but Informations for (*g*) the Queen, although the Suit be exhibited by the Party; and the Queen may pardon any Offence for which any Subject complains there. But if *Taverner* had been attainted at the Common Law in an Action of (*h*) Forgery of false Deeds, there the Queen could not have pardoned it. 2. It was objected, That altho' the Queen may pardon the Burning of the Hand, yet the Defendant might be imprisoned at the Suit of the Party; for before the Statute of (*i*) 18 *Eliz. cap.* 7, the King might in Case of Indictment of Manslaughter pardon the Imprisonment, as appears in (*k*) 15 *H.* 7. 9. *a.* but not in Appeal. And by the Statute of 18 *Eliz.* they cannot deliver the Prisoner (*l*) before he be burnt in the Hand. But it was resolved, that forasmuch as it was enacted by the said Statute of 18 *Eliz.* that after Clergy allowed, and Burning in the Hand, the Prisoner should be presently at large, and delivered out of Prison, which Act was resolved to extend as well to the Case of Appeal as to the Case of Indictment; and the Queen now hath pardoned the Burning of the Hand, for this Cause the Burning of the Hand being discharged, the Party also shall be discharged of his Imprisonment by good Construction of the same Act, otherwise the Party would be lawfully discharged of his Punishment, and yet remain perpetually in Prison, which never was the Intent of the Makers of the Act. And thereupon *Biggins* was discharged.

(*c*) Dyer 201, 202 pl. 67, 68. Cr. El. 682. 3 Inst. 237.

(*d*) Cr. El. 465. Dy. 261. pl. 26.

(*e*) 2 Inst. 200.

(*f*) Moor 571. Cr. El. 682.

(*g*) Antea 48. b Postea 51. a. 2 Inst. 238.

(*h*) Moor 571.

(*i*) Raym. 370. Cr. Jac. 430, 431 6 Co. 68. b. 2 Rol. 222. Hob. 294.

5 Co. 110. a. b.

(*k*) Fitz. Imprisonment 28. Br. coron. 53. Br. Charter de Pardon 21.

Trin.

Trin. 2 Jac.

In the Common Pleas.

HALL's *Case.*

ALice Cooke libelled in the Spiritual Court againſt *Rowland Hall* for Defamation, for calling her Whore, and had Sentence, and Coſts were taxed. *Et decretum fuit quod prædictus Rowlandus Hall foret movendus, & citandus, ad ſolvend' expenſ. citra tale feſtum.* From which Sentence the Defendant appealed, and before the ſaid Feaſt *Hall* obtained the King's Pardon, and thereupon got a Prohibition out of the Common Pleas. And in this Caſe four Points were reſolved.

1. In all Caſes depending between Party and Party in the Spiritual Court, where the Suit is only (*a*) *pro ſalute animæ, vel reformatione morum*, as for Defamation, or laying violent Hands on a Clerk or the like, there the (*b*) K's Pardon is a Bar of the Suit, for the Suit is not to recover any Damages, or any other Thing, but only to inflict Puniſhment on the Offender *pro ſalute animæ*; which Puniſhment the King may pardon as well before as after the Suit begun, for in Truth ſuch Suits are only for the (*c*) King, although they be proſecuted by the Party, and like Suits in the (*d*) Star-chamber preferred by one Subject againſt another, the King may pardon them; for although a Subject proſecutes them, yet the Suits are for the King, and to puniſh the Defendants for their Offences and Miſdemeanors by Impriſonment and Fine, &c. to the King. But if one libels for Tithes or a Contract of Matrimony, or for a Legacy, or the like, where the Plaintiff hath an Intereſt and Property in the Thing in Demand, and Sentence ſhall be given for him for the Thing which he libels for, there the King cannot pardon it, neither before or after the Suit begun.

(*a*) 4 Co. 20. a. Latch. 81. Dav. 73. a. Hob. 82.

(*b*) Dav. 73. a. Hob. 82.

(*c*) 2 Bulſt. 182. Cr. Jac. 335.

(*d*) Anrea 48. b. 50. b. 2 Inſt. 238. 2 Bulſtr. 182. Cr. Jac. 335. 3 Mod. 56. 2 Show. 420.

(a) Cr.El.684. Hob. 82. Dav. 73. a.

2. It was resolved that all Proceedings in the Ecclesiastical Court *ex officio* are for the (a) King. For which Cause, whatsoever the Suit is, there the King may pardon it, for they are only to correct and punish the Party for the Offence or Crime, which the King may pardon, and not for the particular Interest of the Party.

(b) 3 Inst.238. Cr. Car. 9, 47, 199. Cr Jac.159. 335. Noy 91.

3. It was resolved, that in the principal Case, although the Suit be for the King, and which the King may pardon, yet when Sentence is (b) given, and Costs taxed for the Plaintiff, now the Plaintiff hath a particular Interest in them by the Sentence, which the King cannot pardon, although a Day be given for the Payment of them, *ut supra.*

(c) 2 Bulst.182. Cr. Car. 68. Cr. Jac. 335.

The same Law of Suits aforesaid in the Star-chamber after Sentence given, and Costs taxed for the Party, the Pardon shall not discharge them. But if the (c) Pardon had been obtain'd before the Sentence, there the Pardon had discharged the Whole, for then the Court could not have proceeded to any Sentence of the Principal, and by Consequence not of the Costs, which are but accessary.

(d 6 Ca.18. b. Palm. 412. 3 Bulst. 73. 1 Rol Rep.226. 2 Jones 67. 3 Keb. 282. Cr. El. 460. (e) Cr. El. 460. (f) Dyer 305. pl. 17.

4. Although the Defendant hath (d) appealed, by which the Sentence to divers Purposes (by the Opinion of the Doctors of the Spiritual Law) is suspended, as appears in (e) 27 *H.* 6. *Gard* 118. 2 *R.* 2. *Quare Impedit* 143. 1 *H.*7. 12. 2 *Mar.* (f) 105. yet by the first Sentence the Party (notwithstanding the Appeal) had an Interest in the Costs, which could not be discharged by the King's Pardon. And therefore as to this Purpose the first Sentence is not suspended by the Appeal. And afterwards a Consultation was granted for the Costs.

Mich.

Mich. 29 & 30 Eliz.

In the Exchequer.

PAGE's *Case.*

IN an Information againſt *Page* and his Wife for Intruſion in certain Houſes in *Lyn-Regis* in the County of *Norfolk*, on Demurrer, the Caſe was ſuch; *Indy* ſeiſed of the ſaid Houſes in Fee, held in Socage, by his Will in Writing deviſed them to his Wife, (now the Wife of *Page*, who was an Alien born) and before the Death of *Indy*, the Queen by her Letters Patents under the great Seal made the ſaid Woman a Denizen, and afterwards *Indy* died; and the ſaid Letters Patents under the great Seal were corrupted and raſed in the *Teſte*, ſo that now as they were raſed and corrupted they bore *Teſte* after the Death of *Indy*, and upon that *Page* and his Wife got an Exemplification of the Inrolment of the Letters Patents in the Chancery under the great Seal, which was with the true *Teſte* according to the Truth. And afterwards an Office was found before certain Commiſſioners, by Force of a Commiſſion directed to them under the Exchequer-Seal, by which it was found that the ſaid Woman was an Alien born, *&c.* And in this Caſe theſe 9 Points were reſolved by Sir *Roger Manwood* Chief Baron, and the whole Court of Exchequer.

1. That the Office was inſufficient and void for divers Cauſes. 1. Becauſe an Office found by Force of a Commiſſion under the Exchequer-Seal is not ſufficient to intitle the Queen to the Lands of an Alien born: For there are two Manner of (*a*) Offices; one that veſts the Eſtate and Poſſeſſion of the Land, *&c.* in the Queen, where ſhe had but a Right or Title before, and that is called an Office of Intitling: As in Caſe of a Purchaſe by an Alien, or the King's Villain, or by any Body Corporate or Politick in Mortmain, or by a Perſon attainted of Felony, *&* *ſic de ſimilibus*: And ſuch Office which concerns Fee or (*b*) Freehold ought to be by Force of a Commiſſion

(*a*) Hob. 231. Cr. Car. 173. 1 Jones 217. Godb. 312, 325. 2 Rol. Rep. 322, 342. Lane 43. 1 Bulſtr. 34. 10 Co. 115. a.

(*b*) Hob. 231. Cr. Car. 173. Poſtea 56. b.

sion under the great Seal of *Engl.* There is another Office, and
(a) Godb. 312. Moor 293. that is called an Office of (a) Instruction, and that is when the Estate of the Land, &c. is lawfully in the K. before, but the Particularity of the Land, &c. doth not appear of Record, so that
(b) 1 Co. 42. a. it may be put in Charge. As if one be (b) attainted of high Treason, all his Lands, &c. are presently by the Stat. of 33 *H.* 8. *c.* 20. in the King: Or if the K's Ten't commits Felony and is attainted, and dies, in these and the like Cases the Estate of the Land without any Office is in the King: But it doth not appear to the Court of Exchec. of what Lands the Person attainted was seised, at the Time of his Attainder or after, and if that be found by Office by Force of a Commission under the Exchec. Seal, it is a sufficient Record to instruct the King of the Certainty of the Land, &c. by which it may be put in Charge.

(c) 1 Rol. Rep. 395. Cr. Car. 461. Duct. placit. 79. 2. It was resolved, That the (c) Office was insufficient, because it doth not appear what Authority the Commissioners had, but generally, *Inquisitio capta, &c. coram, &c. virtute cujusdam Commissionis eis direct*, and for divers other gross Imperfections the Office was adjudged insufficient.

(d) Moor 325. Co. Lit. 2. b. Hob. 231. 2 Anders. 33. 3. It was resolved, That in the Case of an Alien, (d) Person attainted, so long as he lives, the K's Villain, Alienation in Mortmain, Condition broke, Alienation *contra form' collationis*, and the like, the Inheritance or Freehold of the Land is not vested in the K. till (e) Office found under the great Seal, for that is an Office of Intitling. *Vide* 35 *E.* 3. *Villenage* 22. 8 *E.* 4. 4. 9 *H.* 7. 2. *Mortmain*, 2 *H.* 7. 8. *Condition* 29 *H.* 8. *Charter de Pardon B.* 59. The K's Ten't attainted of Felony, 7 *E.* 4. 29. & 11 *H.* 4. 26. If an Alien and a Subject born purchase Lands to them and to their Heirs, they are Jointenants, and shall join in an Assise, and the Survivor shall hold Place till Office found. *Plow. Com. Nichols's Case, fol.* 477. & 11 *Eliz. Dier* 283. *Alien born. Vide Stanf. Prærogat. Regis, cap.* 18. *fol.* 53.

(e) 1 Jones 78, 79. Moor 325.

(f) Dyer 283. pl. 31. 1 Leon. 47. Goldsb. 29. 102. 2 Sid. 148. Moor 390. 4. The great Question of the Case was, Whether the Def. should plead the said (g) Exemplificat. of the Inrolment of the said Letters Pat. of Denization, by Force of the Stat. of 3 *E.* 6. *c.* 4. or 13 *El. cap.* 6. And it was objected, that neither an Exemplification, nor a *Constat* of any Letters Patents were pleadable at the Com. Law, for as it appears by the Preambles of both Statutes, that this Case of Denization was out of the Words of both Stat. for the Words of the Purview of the Stat. of 3 *E.* (h) 6. are, "All and every Person or Persons, Bodies Politick or "Corporate, which lawfully shall or may claim by Force of "any Patent made since 4 *Feb.* 27. *H.* 8. &c. and all other "that now have, or hereafter shall have any good or lawful Estate, Right, Title, Rent, Profit, &c. of, in, to, or out "of any Lands, Tenements, Hereditaments, or Offices "under any such Patentee or Patentees, &c. shall and may, "&c. make and convey to themselves Title, &c. unto the "said

(g) Hardr. 118. Co. Lit. 225. b.

(h) 2 Inst. 282.

" ſaid Honours, Lands, Tenements, Offices, and other the " Premiſſes, &c. by, from or under the ſaid Patentees or any " of them, &c. by ſhewing forth of any Exemplificat. or *Con-* " *ſtat* of the Roll, &c. And in the Caſe at Bar, the Woman doth not claim any *Eſtate*, *Right*, *Title*, &c. of or in any Lands, Tenements, &c. by Force of any Letters Patents, but only to be made Denizen, which extendeth only to Ability and Capacity of her Perſon, and not to any Lands, Tenements, nor unto any Thing iſſuing out of them. And it was objected, That this Caſe was out of the Statute of 13 *Eliz. cap.* 6. for the Letter of that is, " that all and every Patentee and " Patentees, their Heirs, Succeſſors, Executors and Aſſigns, 2 Inſt. 282. " and all and every other Perſon and Perſons, having by or " from them or any of them, or under their Title, any E- " ſtate, or Intereſt, of, in, or to any Lands, Tenements He- " reditaments, or other Thing whatſoever to ſuch Patentee " or Patentees heretofore granted, &c. By which it appears for the Reaſon aforeſaid, that he who claims to be made a Denizen is out of theſe Words; alſo the Stat. doth intend ſuch Hereditament, or Thing only as may be aſſigned or transferred over, which appears by the ſaid Words. " And all and " every Perſon and Perſons having by or from them, &c. a- " ny Eſtate, &c. of, in, or to any Lands, &c. to ſuch Patentee, " &c. granted. But when the Queen by her Letters Patents makes one a Denizen, it is individual and incident inſeparable to the Perſon of him who is made Denizen which cannot be transferr'd over, and therefore this Caſe is out of the ſaid Act: But it was thereunto anſwered and reſolved by the Court.

1. That it was true, that neither an Exemplification, nor a Conſtat was pleadeable, and to be ſhewed to the Court at the Common Law, becauſe they were but the Tenor of the Inrolment, and the Tenor of a Record is not pleadable by the Law. And with this the Preamble of both the ſaid Statutes agrees, and the Statute of 6 *R.* 2. *cap.* 4. Co. Lit. 225. b. Hardr. 118. Palm. 62.

2. It was reſolved, That the ſaid Act of 13 *Eliz.* did extend to the ſaid Letters Patents of Denization; for it was a great Queſtion conceived on the ſaid Act of 3 *E.* 6. Whether the Patentee himſelf might plead the Exemplification or Conſtat of the Inrolment of his own Letters Patents by Reaſon of the ſaid Words in the Body of the Act, " Shall " and may, &c. make and convey to themſelves Title, &c. " unto the ſaid Honours, Lands, Tenements, &c. by, from " or under the ſaid Patentees, &c. So that by the Words of the Act, the Patentees themſelves were left to the Common Law. *Vide* 1 *Eliz. Dyer* 167. Sir *Tho. Wrothe*'s Caſe; for the Remedy whereof, the ſaid Act of 13 *Eliz.* was made, which is more liberal and beneficial than the ſaid Act of 3 *E.* 6. for that by expreſs Words extends to all Patents whatſoever, without any Reſtraint: For it was reſolved that theſe Doct. pla 213. 2 Bulſtr. 34. Dy. 167. pl. 13. Co. Lit. 225. b.

theſe Words, " All and every Patentee and Patentees, their " Heirs, Succeſſors, Executors and Aſſigns, is a diſtinct Clauſe of it ſelf, and extends to all Letters Patents whatſoever, either concerning Lands, &c. or Perſons, &c. or any Thing, or Matter whatſoever. For in the next Clauſe the Words are, " any Lands, Tenements, or Hereditaments, or any Thing " whatſoever. And afterwards towards the End, " as ſhall " and may ſerve to and for ſuch Title, Claim or Matter; and therefore this Act doth extend to Letters Patents of Creation of *(a)* Dukes, Marqueſſes, Earls, Viſcounts, Barons. Alſo to Pardons of Treaſons, Felonies, &c. Outlawries, Infranchiſements of Villains, and all other Letters Patents which at the Time of the Exemplification or Conſtat are in Force, not lawfully ſurrendred, or cancelled, concerning any Inheritance, Freehold or Chattels, or any other Thing, or Matter real, perſonal, or mixt whatſoever. *Vide* the Opinion of *Mervin* in *(b)* 32 *H.* 8. Tit. *Patents Br.* that a Conſtat was pleadable at the Com. Law, but not an *Inſpeximus*. And the Opinion of *(c) Fiſher*, 12 *H.* 7. 12. *b.* & *vide Lib. Intrationum*, Aid granted on pleading of a Conſtat. But by this Reſolution you will better underſtand the Law in theſe Caſes.

(a) Doct. pla. 213.

(b) Palm. 87. Br. Patents 97. Br. N. C. 192.

(c) Palm. 62. Br. Patent 58.

Note Reader, foraſmuch as the ſaid Acts of 3 *E.* 6. & 13 *Eliz.* extend to make an Exemplification or Conſtat of the Inrolment of Letters Patents pleadable, it is requiſite to ſhew you the Difference between an Exemplification and a Conſtat, and the Signification alſo of thoſe Words by which Letters Patents are commonly called *(d) Inſpeximus*, *Innoteſcimus*, *Vidimus*: And it is to be known, that an Exemplification, and an *Inſpeximus*, as an *Innoteſcimus* and *Vidimus* are all one: An *Inſpeximus* or Exemplification begins in this Form; *Eliz. Dei gratia*, &c. *omnibus*, &c. *inſpeximus* (e) *irrotulament' quarund' literar' paten'*, &c. and recites them *de Verbo in Verb'*, and concludes in ſuch Form, *Nos autem tenorem literarum paten' præd'*, &c. *ad requiſitionem A. B. duximus exemplificand' per præſentes. In cujus rei teſtimonium*, &c. And it is called *Inſpeximus*, becauſe it begins after the King's Stile, with this Word, *Inſpeximus*; And it is called Exemplification *a re ipſa*, becauſe the Record is thereby exemplified, as appears by the End of it, *duximus exemplificand' per præſentes*. And a *Conſtat* after the King's Stile begins; *Conſtat nobis per Inſpection' Rot' Cancel' noſtræ quod Dom' Henric' nuper Rex Angliæ octav' pater noſter præchariſſimus, literas ſuas Patentes fieri fecit in hæc verba: Henric' Dei gratia*, &c. and recites all the Letters Patents *de verbo in verbum*, and concludes, *Nos autem pro eo quod literæ Patentes prædict' ſunt caſualiter amiſſæ, ſicut A. B. nobis in Cancellar' noſtra perſonaliter conſtit' ſacramentum præſtitit corporale, & quod ipſe literas præd', ſi eas impoſter' reperir' contigerit, nobis in Cancell' noſtr' præd' reſtituerit cancellandas*

(d) Co. Lit. 225. b.

(e) 8 Co. 8. a.

cancelland' tenorem irrotulament' præd' ad requisitionem J. S. duximus exemplific' per præsentes. In cujus, &c. And it is called a *Constat*, because after the King's Stile it begins with this Word, *Constat*. And it is to be observed, That by none of them any Thing is exemplified, but the Tenor of the Record. Also by that it appears, that a Man cannot have a *Constat* without an *Affidavit*, as by the Form of the *Constat* appears. But an *Inspeximus* may be obtained without *Affidavit*. An *Innotescimus* or *Vidimus* are all one, and are always of a Charter of Feoffment, or some other Instrument which is not of Record; and the *Innotescimus* begins in this Form; *Regina, &c. omnibus, &c. Inspeximus quoddam script' fact' per A. B. Radulpho D. sigill' ipsius A. sigill' (ut dic') in hæc verba: Sciant præsentes, &c.* and recites the Instrument *de verbo in verbum. Et hoc omnibus quorum interest aut interesse poterit in præmissis Innotescimus per præsentes. In cujus rei, &c.* And it is called *Innotescimus*, because of this Word *Innotescimus* in the End of it. And sometimes it begins, *Vidimus quoddam scriptum, &c.* and then it is called a *Vidimus*; For the Antiquity of an *Inspeximus* or Exemplification in the Form that now is used, I have read in the Chronicles of the Monastery of S. *Martin* of *Battaile*, that King *Henry* the first invented the said Form; for these are the Words of the Chronicle, *Contigit unam ex chartis Will' fundatoris de Bello vetustate dissolvi, unde Odo Abbas a Rege Hen. petiit, ut sigillo suo remunita renovet'. Rex assentit. Ac ubi in chartis antiquis posterior solet mention' facer' prioris in hujusmodi verbis: Sicut charta talis Regis vel hominis testatur. Rex Henr', ne clausula illa rescriberet', sed aliam antea inusitat', ipse dictavit hoc modo: Quoniam inspeximus chartam Will', &c. (recitans totam priorem cartam.) Et inclytus Rex reddidit hanc rationem facti sui. Si enim (inquit) clausula, quæ suppressa est, minime inserta fuisset charta posterior sine prio' modicum conferret, nunc vero, nulla de præcedente facta mentione, hæc charta sola sufficit, etiamsi omnes alii deperiissent, quoniam ego ipse, quæ in persona vidi, testifico.*

3 Inst. 173. Co. Lit. 225. b.

Mich.

Mich. 30 & 31 Eliz.

In the Common Pleas.

KNIGHT's *Case.*

1 Anderſ. 173, 174, 175, &c. 3 Leon. 124, 125, 126, &c. Moor 199, 200, 201, &c. Cr. El. 855. Goldsb. 15, 16, 17, 18, 19, 20, 21, &c.

IN an Action of Treſpaſs between *Knight* and *Breech*, the Caſe was; The Prior of S. *John*'s of *Jeruſalem*, *anno* 29 *H.* 8. made a Leaſe by Deed indented with the Aſſent of his Covent under their common Seal, of divers Houſes in *Clerkenwell* in the County of *Midd.* for Years yet enduring, yielding the yearly Rent of 5 *l.* 10*s.* 11 *d.* at four Feaſts in the Years, uſual in the City of *London*, *ſcil.* for one Houſe 3 *l.* 11 *d.* for another 20*s.* and for the other Houſes ſeveral Rents Reſidue of the ſaid Rent of 5 *l.* 10*s.* 11 *d.* with Condition that if the ſaid Rent of 5 *l.* 10*s.* 11 *d.* be behind in Part or in all, at any of the ſaid Feaſts, that then the ſaid Prior and his Succeſſors ſhould re-enter. And afterwards the ſaid Priory and all the Poſſeſſions thereof came to King *H.* 8. by Surrender of the ſaid Prior and Covent, and by the Statute of 31 *H.* 8. which King in the 36 Year of his Reign by his Letters Patents under his great Seal granted one of the Houſes (for which 20*s.* of the Rent was by the ſaid Leaſe reſerved) to the Leſſee and another in Fee, and afterwards the Leſſee died; and afterwards it was found by Inquiſition, in the County of *Middleſex*, *anno* 26 *Eliz.* by Force of a Commiſſion under the Exchequer Seal, that 37*s.* 5 *d.* Parcel of the ſaid Rent of 5 *l.* 10*s.* 11 *d.* reſerved by the ſaid Demiſe for the Reſidue was behind at the Feaſt of S. *Michael* then for a Quarter of a Year then laſt paſt: And that the ſaid Feaſt of S. *Michael* was one of the uſual Feaſts of Payment in *London*; and that afterwards the Queen, before the Commiſſion returned, and before any Entry or Seiſure by her, by her Letters Patents under the Great Seal, granted the Reſidue of

of the Houſes to one in Fee, who made the Leaſe to the Plaintiff *Knight*, on whom *Breech* the Defendant the Aſſignee of the Executor of the firſt Leſſee entred, againſt whom *Knight* the Plaintiff brought an Action of Treſpaſs. And this notable Caſe was often argued at the Bar in the Common Pleas, and afterwards openly by the Juſtices at two ſeveral Days; and becauſe the Court was divided in Opinion, this Caſe was argued in the Exchequer-Chamber before all the Juſtices of *England*. And after Argument at Bar, and divers Conferences had amongſt the Juſtices at Serjeants Inn it was adjudged for the Plaintiff: And in this Caſe theſe Points were reſolved.

1. That it was one intire Leaſe, and conſiſted on ſix Unities: 1. The Demiſe is made by one Word of Demiſe. 2. To one Leſſee. 3. To have one Beginning. 4. One Term of Years. 5. One Determination of it. 6. One Reſervation of Rent in Groſs at the firſt; and the (*videlicet*) afterwards doth not make a Severance of it as this Caſe is, but is rather a ſeveral Declaration of the ſeveral Values of each Parcel, by which it appears how and for what Rates the *(a)* whole Rent of 5*l.* 10*s.* 11*d.* is reſerved. But it was reſolved, that on one Leaſe ſeveral yearly Rents by apt Words might be reſerved, for the Reſervation of the Rent is not of the Subſtance of the Leaſe, for a Leaſe may conſiſt without any Reſervation, either for Part, or for the whole. And therefore if a Man makes a Leaſe to *B.* of the Manors of *Dale*, *Sale* and *Down*, to have and to hold to him the ſaid Manors for 21 Years, rendring Yearly out of the Manor of *Dale* 10*l.* in that Caſe the Manor of *Dale* is only charged with the ſaid Rent, and the Manors of *Sale* and *Down* are not charged with it; And in that Caſe the Rent is incident to the Reverſion of the Manor of *Dale* only; and if in that Caſe the Leſſor grants over the Reverſion of the Manors of *Sale* and *Down*, yet the whole Rent of 10*l.* doth remain with the Leſſor, and the Leſſor or his Leſſee cannot diſtrain for this Rent in the Manors of *Sale* and *Down*: And in the ſame Caſe the Leſſor might have reſerved a Rent of 10*l.* out of the Manor of *Dale* during 5 Years, and 10*l.* out of the Manor of *Sale* during 10 Years and 16*l.* out of the Manor of *Down* to commence 10 Years after, and one on a Condition precedent, another on a Condition ſubſequent, and the third abſolutely, and to be paid at ſeveral Days and Places; in which Caſes without Queſtion the Rents are ſeveral; and for the Rent of the one, the Leſſor cannot diſtrain in any of the other: And a Surrender of the Manor will not extinguiſh the Rents for the others. And therewith agree 14 *Eliz. Dy.* in *Winter*'s *(b)* Caſe 308 & 309. by three Juſtices, 17 *E.* 3. 75. b. 17 *Aſſ. p.* 10. & 9 *E.* 12. And ſuch Conſtruct. agrees alſo with the true Intent of the Parties, which is always to be obſerved, when it may by reaſonable

(a) 3 Bulſtr. 256. Hob. 172. Ley 77. 2 Rol. 448. Poſt. 55. b.

(b) Moor 98, 205. 1 Anderſ. 174. Cr. El. 341. 3 Leon. 124. Goldsb. 16, 19. Hob. 172. 2 Rol. 448. Cr. Car. 154. 2 Bulſtr. 281, 282. Dy. 308, 309. pl. 75.

reasonable Construction consist with the Rule and Reason of the Law. *Vide* 29 *E.* 3. 39. 29 *Ass. p.* 52. 18 *Eliz. Dy.* 350. 5 *Ass. p.* 6. 7 *Ass. p.* 1. 15 *Ass. p.* 11. But in the Case at Bar it was resolved, that the Rent was *(a)* entire, because first the Lessor reserves the yearly Rent (in the singular Number) of 5*l.* 10*s.* 11*d*: And afterwards when the Lessor comes to his Condition for Payment of the said Rent, the Condition is also in the singular Number, *scil.* if the said Rent of 5*l.* 10*s.* 11*d.* be behind in Part or in all, so that it agrees with the Words of the Indenture (which import the Intent of the Parties) that in this Case it should be one entire Rent; and if it should be several Rents, then a Question might be made of the Validity of the Condition which extends to the said Rent, &c. in the singular Number, *Sed (b) benignæ faciendæ sunt interpretationes chartarum propter simplicitatem laicorum, ut res (c) magis valeat quam pereat.* And by this Construction all the Parts of the said Indenture well agree with themselves, and with the Law also. And the Difference between this Case and the said Case of *(d) Winter* is, because there, the Reservations are several, and here (on Consideration of the whole Indenture) intire, *quod nota bene.*

(a) 3 Bulstr. 256. Hob. 172. Ley 77. 2 Rol. 448. Moor 52, 98.

(b) Co. Lit. 36. a. 183. b. 301. b. 2 Bulstr. 282.

(c) 1 Co. 76. a. 2 Co. 72. b. 5 Co. 8. a. 8 Co. 95 b. 3 Keb. 288. 1 Mod. Rep. 109. 2 Jones 69.

(d) Antea 55. a. Dyer 308, 309. Moor 98.

2. It was resolved, That admitting they had been several Rents, yet forasmuch as the Condition was intire, giving one intire Entry into the whole for Default of Payment of any Part, by the Severance of any Part of the Reversion (if it was in the Case of a common Person) (e) the whole Condition would be destroyed. And therewith agrees the Judgment in the said Case of *Winter*, 14 *Eliz. Dyer* 308, 309.

(e) 1 Rol. 472. Co. Lit. 215. a. 4 Co. 120. a. Styl. 316, 317.

3. The great Doubt was, Whether this being in the King's Case, if the Condition by the Severance of Part of the Reversion be destroyed or should be apportioned. And, 1, it was objected, That the Lease in the Case at Bar was made by common Persons, and the Reversion thereof was vested in the King by their Surrender, and by the Act of 31 *H.* 8. in which Case the King cannot take it in other Manner than the Subject had it before. For the Parliament which gave it the King, shall bind the King as well as the Subject, and his Prerogative shall not be extended to do (f) Wrong or Injury to any Subject, as it is held in 13 *E.* 4. 8. *a.* 19 *H.* 6. *Br. Quinzim.* 5 *E.* 3. 6. 17 *E.* 3. 40. *Stamford* 543. *Plow. Com. Nichols* Case 246. 2. It was objected, That if the Condition in this Case should be divided, the Law and Nature of the Thing would be altered by the King's Grant, and that the King cannot do, for he cannot alter nor change the Law, or Custom of the Land by his Patent. *Vide* 11 *H.* 4. (g) 73. 37 *H.* 8. *Patents Br.* 100. &c. 3. If the Condition should be divided, he would make two Condit. of one, and the Lessee would be subject to two, and for the Non-payment of the Rent to one, the other might enter, and many Absurdities would follow thereupon; all which will be avoided, if according to the

(f) 1 Co. 44. b. 52. b. 11 Co. 72. a. 2 Inst. 681. Co. Lit. 19 b. 13 E. 4. 8. a. Plowd. 246. b. 487. b. Cr. Argument 60. 1 Rol. Rep. 167. Noy 182. Moor 416. Godb. 317. 7 Co. 12. b. Dav. 75. a. b.

(g) 11 H. 4. 37. b.

the Rule of Law the Condition ſhall not be divided. But on great Deliberation, and the Juſtices of the Common Pleas having divers Conferences with *Wray* Chief Juſtice of *England*, *Manwood* Chief Baron of the Exchequer, and all the other Juſtices, at laſt, on mature Conſideration it was reſolved, that the (*a*) Patentee of Parcel, ſhould not take Advantage of the Condition; but as to that Part of the Land demiſed, it was altogether diſcharged of the Condition. But it was alſo reſolved, That as to the Reſidue the Condition (*b*) remain'd with the Reverſion which the King hath, and ſo no Prejudice to any Party, nor Wrong done to any by the King's Prerogative, nor the King by his Grant doth not alter the Law. For the Law makes a Difference between the King's Grants, who always is preſumed to intend *ardua regni pro bono publico omnium*, &c. and the Grants of Subjects who may follow their private Buſineſs, for the Grants of Subjects are always taken moſt ſtrong againſt them, but the Grants of the King are taken and interpreted by a favourable and beneficial Interpretation, ſo that no Prejudice ſhall accrue to him by Conſtruction or Implication on his Grant more than he truly intended by it. And therefore if the King grants Land to *J. S.* and his Heirs, and in truth *J. S.* is the King's Villain, it ſhall not (*c*) enfranchiſe the Villain by Implication. The ſame Law of an (*d*) Alien born, 17 *E.* 3. 39. (*e*) the Advowſon of a Prebend held of the King was aliened to an Abbot and his Succeſſors; and the King granted to the Abbot and his Succeſſors, That the Abbot and his Succeſſors ſhould hold the Prebend to his own Uſe, yet he ſhall ſeiſe the Advowſon for the Alienation in Mortmain, and ſhall deſtroy the Appropriation, for he ſhall not be ouſted of his Right to the Advowſon by Implication. And in 2 *R.* 3. 4. 21 *E.* 4. 46. & 34 *H.* 6. If two (*f*) are indebted to the King, and the King releaſes to one it ſhall not diſcharge the other. And in 6 *H.* 7. 15. 11 *H.* 7. 10. if the King releaſes all (*g*) Demands, a Right of Inheritance ſhall not be releaſed. 21 *H.* 7. 7. The King grants Lands in Fee on Condition that he ſhall not (*h*) alien, it is good; but in all theſe Caſes it is otherwiſe in the Caſe of a common Perſon. And in many Caſes the King who claims by a Subject ſhall be in a better Caſe in Reſpect of the Dignity and Prerogative incident by the Law to the Royal Perſon of the King, than the Subject himſelf by whom he claims. As if the King has a Rent-Seck by Attainder of Treaſon, or by Grant, (*i*) he ſhall diſtrain for it not only in the Land charged, but in all his other Lands, and yet the Subject by whom he claims ſhould not diſtrain for it. If a Subject has a (*k*) Recogniſance or Bond, and afterwards is outlawed, or attainted, the King ſhall ſeiſe all the Land of the Conuſor, or Obligor, whereas he himſelf could have but a Moiety: So in the Caſe at Bar, the King ſhall take Advantage of the Condit. without (*m*) Demand, and

(*a*) 2 Bulſtr. 281. Stile 316. Co. Lit. 215. a. 1 Rol. 472.
(*b*) 1 Rol. 472. Co. Lit. 215. a.
(*c*) Plowd. 501. Goldsb. 20. 2 Sid. 81.
(*d*) 3 Leon. 243. Plowd. 502. b.
(*e*) 7 Co. 14. b.
(*f*) 3 Leon. 243. 2 Sid. 82.
(*g*) Co. Lit. 291. b.
(*h*) Lit. ſect. 360, 361. Co. Lit. 223. a. 3 Leon. 126, 127. Moor 204. Golds. 19, 22. 4 Co. 3. b. 6 Co. 41. b. Hob. 170. Br. Condition 82, 135. Dr. & Student. 39. a. 123. a. 21 H. 6. 33. b. 8 H. 7. 10. b. 13 H. 7. 23. a. 21 H. 7. 8. a. Br. Prerog. 102. 21 E. 4. 47. a. Plowd. 77. a.
(*i*) 5 H. 7. 38. b. 3 Leon. 125. 13 E. 4. 6. a. 2 Inſt. 131. 4 Inſt. 119. Antea 4. a. Plowd. 239. a. 243. b. 343. a. Br. Prerogative 68, 77. Fitz. Grant 47. 44 E. 3. 45. a. Fitz. Prerog. 7. Br. Diſtreſs 6, 49. Goldsb. 17.
(*k*) 3 Leon. 125. Goldsb. 17. Plowd. 243. a.
(*l*) 4 Co. 73. a. Moor 210, 296. 2 H. 7. 8. b. Plowd. 243. a. Fitz. Prerog. 10. Br. Prerog. 101. Br. Condit. 125. Br. Entry congeable 88.
(*m*) Cr. Jac. 513.

and yet the Prior himſelf under whom the King claims could not re-enter for Default of Payment of the Rent without a Demand made. And if the King purchaſe a Seigniory of which Land was held by Poſteriority, the King ſhall be in a better Condition than the Subject from whom he claims, and ſhall have the Priority. And ſo likewiſe ſhall his Grantee have in ſuch Caſe, as it is held in 24 *E.* 3. 65. *Garde* 27, 47.

F. N. B. 142. f.

Hard. 15. Lane 41, 42.

4. It was reſolved, That although there was 37 *s.* 5 *d.* which was found to be behind at *Michaelmas*, which was more than was due at any one Quarter of the Year, yet it is ſufficient for the King when the Office hath Matter and Subſtance, for the ſole and ſubſtantial Point which proves the Breach of the Condition, is the Non-payment of the Rent, or any Part of it, and it is not material how much Rent was behind, for if any Part was behind it is ſufficient; and the Party who traverſes, ought not to traverſe that the ſaid Sum of 37 *s.* 5 *d.* was behind, but that the ſaid Sum of 37 *s.* 5 *d.* or any Part of it was behind; and every Office being the Finding of Lay People which hath Matter and Subſtance, ſhall ſerve the King, although the Manner of it be not ſo formal as it might be. And therefore if it be found that the Rent for one whole Quarter was behind, and in Truth but Part of it was behind, it ſhall ſuffice for the King. Alſo that the Jurors in *Midd.* might find which were the uſual Feaſts in *London* being another County.

1 Anderſ. 177.

5. It was reſolved, That although without Office the Leaſe was not void, becauſe a Clauſe of Re-entry is only reſerved, as appears before, and no Limitation, that for Non-payment the Leaſe ſhould be void, and although the Office was not returned before the Date of the Patent; yet foraſmuch as the Office was found before the Grant, and afterwards it was returned of Record, the Grant was good, and that in this Caſe of Re-entry, by the Office without Seiſure, the Leaſe was void.

Cr. Car. 100, 173. Mo. 296.

6. It was reſolved, Although the Commiſſion was under the Exchequer-Seal, yet foraſmuch as thereby a Chattel *ſcil.* a Leaſe for Years ſhall be void, the Inquiſition found by Force thereof was good enough, although the Commiſſion was not under the Great Seal.

Cr. El. 855. Cr. Car. 173. 10 Co. 115. a.

And ſo note a Difference between this Caſe and *Page's* Caſe before. And afterwards the Plaintiff according to the Reſolutions had Judgment to recover.

Antea 52. a.

Hil

Hill. 32 Eliz.

In the King's Bench in a Writ of Error.

Specot's *Case.*

Humphrey Specot Eſq; and *Elizabeth* his Wife, *Paſch.* 28 *Eliz.* brought a *Quare Impedit* againſt the Biſhop of *Exeter*, and declared, that *John Arſcot* was ſeiſed of the Manor of *Tedcote* in the County of *Devon*, to which the Advowſon of the Church of *Tedcote* was appendant in Fee, and held it in Socage; and ſo ſeiſed, 1 *Jan.* 4 & 5 *Ph.* & *M.* by his Will in Writing deviſed the ſaid Manor with the Appurtenances, to which, &c. to the ſaid *Elizabeth* for Term of her Life, and died, by which the ſaid *Elizabeth* entered into the ſaid Manor, and was thereof ſeiſed for Term of her Life, and took to Husband the ſaid *Humphrey*, and they preſented to the ſaid Church, then being void, *David Walter* who was admitted, inſtituted and inducted in Time of (*a*) Peace, &c. And afterwards the Church became void by the Death of the ſaid *David Walter*, and yet is void; and ſo it doth appertain to the Plaintiff to preſent, and that the Biſhop did diſturb him, &c. The Biſhop pleaded, that the ſaid Church *fuit infra dioceſ. ſuam, quodque ipſe nihil habet, nec habere clamat in Eccleſia illa, &c. niſi admiſſion', inſtitution' & induction' perſonarum, &c.* And that the ſaid Church *eſt beneficium cum cura animarum, &c.* And that the ſaid *David Walter* 24 *Nov'* 27. died, & *quod Eccleſia prædicta vacavit, ipſo Epiſcopo adtunc ejuſdem Eccleſiæ Ordinario exiſten'. Et ulterius idem Epiſcopus dicit, quod prædict' Humfrid' infra ſex menſes, proxim' poſt mortem prædict' David, apud civit' Exoniæ, in Com' ejuſdem Civit' præſentavit eidem Epiſcopo tunc Ordinar' Eccleſ. præd' quendam Johannem Holmes ut clericum ſuum, ad Eccleſiam prædictam ſic vacantem, eundem Epiſcopum requirent', quod ipſe eundem Johannem Holmes admittere, ipſumque in ead' Eccleſia inſtituere, induci facere dignaret': Super quo idem Epiſc', ut Eccleſ. præd' Ordinarius, apud, &c. præd' Johan' Holmes ſic præſentat' de habilitat' & idonietate ſua in hac parte, ſecund' Leges Eccleſiaſt' examinav', ut de Jure debuit: Et ſup' hujuſm' examinationem*

3 Leon. 198, 199. &c. Goldsb. 35, 36, &c. 52. 1 And. 189. 190. Jenk. Cent. 258, 259.

(*a*) Doct. pl. 291.

nem ſuam, idem Epiſc' adtunc & ibid' invenit præfat' Johann' Holmes ſore ſchiſmaticum inveteratum, ac eundem Johann' Holmes ea occaſione per legem ſacroſanct' Eccleſ. fore perſonam inhabil', & minime idoneam, ad acceptand' aliquod beneficium cum cura animarum, per quod idem Epiſcopus ut Eccleſ. illius Ordinarius adtunc & ibidem recuſavit admittere præd' Johann' Holmes ad Eccleſiam prædictam; and pleaded that he of the Cauſe of Refuſal aforeſaid, gave Notice to the ſaid *Humph. &c.* upon which the Pl. did demur in Law: And it was adjudged in the Com. Pleas, That the Biſhop's Plea was inſufficient, becauſe he ſhewed generally that he was (*a*) *ſchiſmaticus inveterat'*. And on this Judgm. a Writ of Error was brought in the King's Bench by the ſaid Biſhop, and two Errors were aſſigned in the Record.

(*a*) Doct. pl. 60. 1 Rol. Rep. 136, 237, 238. 2 Bulſtr. 139, 329. 3 Leon. 200. 1 And. 190. Cr. El. 242. Hob. 206.

1. Becauſe no Preſentment was alledged in the Deviſor, but only in the Deviſees for Life; but *non allocatur*, for the (*b*) Preſentment of the Leſſee is a ſufficient Title for himſelf without Queſtion, (*c*) 8 *H.* 5. 10.

(*b*) Doct. pl. 301. Poſtea 97. b. 6 Co. 57. b. 2 Rol. 378, 379. Cr. El. 518. Moor 456. 2 And. 49, 50. F. N. B. 33 h. 1 Leon. 230.

(*c*) 8 H. 5. 4. b. Fitz. quare impedit 201.

2. Error was aſſigned, That the Court erred in Law in giving Judgm. againſt the Biſhop for the Inſufficiency of his Plea, where his Plea was ſufficient. And it was objected by the Biſhop's Counſel, that the Biſh. need not ſhew any particular Schiſm, for if he ſhews it, the Court cannot either decide or examine it, becauſe it is a ſpiritual Thing which lies not in their Conuſance, as it is held 27 *H.* 8. 14. *a. b.* That for calling a Man (*d*) Heretick no Action on the Caſe lies in our Law, for thoſe of the Com. Law cannot determine what is Hereſy; and in 15 *H.* 7. 7, 8. *a.* it is agreed by all the Juſtices, that the Biſh. in Examination is Judge, and not a Miniſter, and therefore the Law gives Faith and Credit to his Judgm. And it was ſaid, That it is a good Cauſe to remove a (*e*) Coroner from his Office generally, becauſe he is *minus idoneus ad officium illud exequend'*, as appears by the *Regiſter* and *F. N. B.* 163. But it was anſwered and reſolved, That the Plea of the Biſh. was inſufficient. Firſt, it is declared by the Stat. *De* (*f*) *Articul' Cleri cap.* 13. That *De idonietate perſon' præſentat' ad beneficium Eccleſiaſt' pertinet examinatio ad Judicem Eccleſiaſticum, &c. ut propter defect' ſcient' & aliarum cauſarum rationabilium*: So that it appears there ought to be reaſonable Cauſe, & *cauſa vaga & incerta non eſt rationabilis*, for it is commonly ſaid, *Quod doloſus verſatur in univerſalibus*: And by the Reaſon which hath been made, that the general Allegation of the Pl. ſhould be good in the Caſe at Bar, it is good, becauſe the Biſhop in Examination is Judge; by the ſame Reaſon it may be maintained that he may refuſe any Clerk, becauſe *non eſt idoneus* generally, or becauſe he is (*g*) *criminoſus* generally: But although he is Judge in Examination, yet foraſmuch as the Proceedings of the Biſhop are not of (*b*) Record, the Cauſe of the Refuſal is

(*d*) 2 Inſt. 631. 4 Co. 17. a. 20. a. Hob. 296. Br. Action ſur le Caſe 2.

(*e*) 8 Co 41. b. F. N. B. 163. n. Poſtea 58. b.

(*f*) Goldsb. 36. Dver 293. pl. 3. 2 Inſt. 631. de Articulis cleri cap. 13. 2 Co. 34 a. 3 Co. 81. a. 2 Bulſtr. 226. 1 Rol. Rep. 157. Moor 521.

(*g*) 2 Sid. 97. 1 Rol. Rep. 192, 237.

(*b*) Doct. pl. 351.

is (a) traverſable, and if it be traverſed, and the Party refuſed be alive, it ſhall be tried by the Metropolitan, and if he be dead, it ſhall be tried by the (b) Country. And if ſuch a general Allegation of Biſhops ſhould be admitted (to which the Patron ſhall not have Anſwer, becauſe the Biſhop in his Examination is Judge, the Cauſe being ſpiritual, as it hath been objected) Patrons would ſuffer great Prejudice in theſe Times in their Preſentations: In 38 *E.* 3. 2. (c the Biſhop Plaintiff ſhewed for Cauſe of Refuſal that the Preſentee had acknowledged himſelf to be perjured, *&c.* and ſo *criminoſus*, by which it appears, that the Alledging that he is *criminoſus* generally is not good, for no certain Iſſue can be taken thereupon. *Et dubitatur* there, Whether there the Biſh. ought not to ſay *in facto* that he is perjured, and not that he had confeſſed himſelf perjured. In 5 *R.* 2. *Trial* 54. it was agreed for good Law, That if a Miſcreant or Schiſmatick be preſented, admitted and inducted, it is a good Cauſe of Deprivation. So if he be irreligious he may be refuſed, as it is ſaid in 5 *H.* 7. 6. But when he is charged with the one, or refuſed for the other, it ought to be alledged in particular, ſo that the Party may anſwer to it. And it was obſerved, that it appears in our Books, that the Cauſe of Refuſal ought to be certain, as in 5 *H.* 7. 19. & 11 *H.* 7. 7. & 37. That the Preſentee is a Baſtard (d), Villain, within Age, or illiterate, *&c.* And 15 *H.* 7. that the Patron had been (e) excommunicated by 40 Days, and therefore his Preſentee is not to be admitted; or that the Preſentee had committed Manſlaughter, as it is held in 38 *E.* 3. 2. or that the Preſentee is outlawed, for then he is not *idonea perſona*, or one who is *mere laicus*, *Mich.* 12 & 13 *Eliz.* (f) *Dier* 293. *Vide* 8 & 9 *Eliz.* (g) *Dier* 254. The Biſhop of *Norwich* refuſed one becauſe he was a Haunter of Taverns, and a Player at unlawful Games, *ob quod & diverſa alia crimina* he was *criminoſus*, & *non idoneus*, And it was adjudged, that the particular Cauſes were not ſufficient, for they were not *mala in ſe*, but (h) *mala prohibita*. And *quod ob diverſa alia crimina*, he was *criminoſus*, & *non idoneus*, was too general and incertain. As 40 *E.* 3. 6. in Tender of a Marriage and Refuſal, the Heir ought to alledge a certain Cauſe of the Refuſal, whereof Iſſue may be taken.

(a) Doct. pl. 351.

(b) 2 Inſt. 632.

(c) 3 Leon. 199. Goldsb. 35, 36. Fitz. Quare Impedit 124. Dyer 293. pl. 3. 2 Rol. 356.

(d) 2 Rol. 356.

(e) 2 Rol. 355.

(f) Dyer 293. pl. 3.

(g) Hob. 296. Goldsb. 35. Godb. 36. 2 Rol. 355. Dyer 254. pl. 2.

(h) 2 Bulſtr. 139. Hob. 296. 1 Rol. 355. 2 Rol. 355. 1 Leon. 106. 2 Leon. 35.

And it was reſolved, That all ſuch as are (i) ſufficient Cauſes to deprive an Incumbent, are ſufficient to refuſe a Preſentee. And altho' it doth not appertain to the King's Court to determine Schiſms or (k) Hereſies, yet the original Cauſe of the Suit being Matter whereof the K's Court hath Conuſance, the Cauſe of the Schiſm or Hereſy, for which the Preſentee is refuſed, ought to be alledged in certain, to the Intent that the King's Court may conſult with Divines to know

(i) 2 Rol. 355.

(k) Wing. Max. 8. 27 H. 8. 14. a. b.

whether it be Schism or not; and if the Party be dead, thereupon to direct the Jury that try it. And as to the Case of the (*a*) Coroner which hath been put, it was answered, That it was not to be compared to the Case of a Presentee, for such general Allegat. is not sufficient as it is confessed by both Sides, either to refuse a Presentee, or to deprive an Incumb. because he is *persona minus idon'* generally. And the Coroner at the com. Law hath but the Keeping of the Rolls of the Pleas of the Crown, but the Incumb. hath the Care and Keeping of Souls, and therefore the Law requires more Circumspection and Certainty in the one Case than in the other. 2. The King may remove a Coroner by Writ directed to him for a Cause which shall not be traversed as appears in *F.N.B.* 163. and so not like.

(*a*) Antea 57. b. 84 Co. 41. b. F.N.B. 163. N.

(*b*) Stanf. Cor. 88. a.

Then anoth. Error not assign'd was moved, *sc.* That for the Insufficiency of the Bish. Plea, the Court gave Judgm. for the Pl. *Ideo consider at' est quod præd'* H. & E. *recuperent vers. prædict' Episcopum præsentation' suam ad Eccleſiam prædictam, & habeant breve Joh. Archiepiscopo Cantuar' totius Angliæ primat', loci illius Metropolitano, eo quod præd Episc' est pars, &c. Et idem Episc' in misericordia.* And afterwards a Writ to inquire of the Value of the Church was awarded, and the Value and other Points of the Writs found and returned; and upon that Judgm. was entered again, *sc.* That the Pl. shall have a Writ to the Archbish. *ut supra. Et quod recuperent versus præd' Episc' damna, &c. Et præd' Episc' in Mi'a:* So that the Bishop was (*c*) twice amerced, and every Amercement of a Bishop is 5 *l.* and in this Case he ought not by the Law to be twice amerced; and therefore this Difference was taken, if a Man brings Trespas against two, and one is found guilty to Damages by himself, and the oth. is found guilty to Damages by himself, in that Case each Def. shall be severally amerced; and the Pl. shall be also severally amerc'd against each of them, as appears in 47 *E.* 3. 20. But in an Action against (*e*) one and the same Def. or Ten't, and the Def. or Ten't pleads one Plea to Part, and another Plea to the Residue, or confesses Part, and pleads to Issue for the other Part, and the several Issues be found against him, yet the Def. or Ten't shall not be twice amerced. And therewith agrees 9 *E.* 3. 6. by *Herle*, & 22 *H.* 6. wherefore it was concluded, That forasmuch as the Bishop being one and the same Person was twice amerced, in this Case it was Error.

(*c*) 1 Rol. 218.
(*d*) 1 Rol. 216. 218.
(*e*) 1 Rol. 218. 8 Co. 61. a.

Against which it was answered by one of Counsel with the Def. That the later was only a Recital of the former, and so to give a full Judgm. of all with the Damages, and not a new Judgm. for he cannot have two Writs to the Metropolitan, no more than he can be (*f*) twice amerced. But if it was *gratia argumenti*, admitted, that the later Judgment was erroneous, yet the (*g*) first Judgment is good and perfect in it self, and shall not be impeached for any Error in the second

(*f*) Jenk. Cent. 259. 1 Rol. 218.
(*g*) 1 Rol. 776.

second Judgment; for the first Judgment was the Judgment which was in the *Quare Impedit* at the common Law, for before the Stat of *West.* 2. *cap.* 5. the Plaintiff in a *Quare Impedit* did not recover Damages (*a*) And the Plaintiff after the said Statute may take the Judgment (*b*) at the Common Law, and relinquish the Benefit of the Statute if he will, *Quod concessum fuit per totam curiam*, for which Cause the Defendant's Counsel prayed that the Judgm. might be affirmed, and so it was.

(*a*) 6 Co. 51. a. Co. Litt. 17. b. 344. b. 2 Inst. 362. 3 Inst. 156, Cr. El. 162.
(*b*) Jenk. Cent. 259.

Note Reader, the Matter in Law was resolved and adjudged by both Courts.

Hill. 32 Eliz.

In the King's Bench

FOSTER's *Case*.

JOHN *Foster* and *Ursula* his Wife brought a Writ of false Imprisonment against *Robert Smith*, and on the Pleading and special Verdict, the Case was such; *scil.* That the Town of *Brancaster* is in the Hundred of *Smithden* in the County of *Norfolk*; and that the Defendant was *præd' tempore quo, &c.* one of the Constables of *Brancaster*. And that *Nathaniel Bacon* Esquire, then one of the Justices of Peace within the said County, made a Warrant sealed with his Seal directed amongst others to the Constables of *Brancaster*, reciting that *John Lane* of *Brancaster* was in Fear of his Life, Maim and Burning of his Houses by *Ursula* the Plaintiff, *&c. Vobis, &c. præcipimus quod præd' Ursulam coram aliquo Justiciarior' nostrorum ad pacem in Com' prædict' assign' venire faciat', seu aliquis vestrum venire faciat sufficient' manucapt', quod ipsa prædict' Ursula præfat' Johann' Lane damnum & malum aliquod, &c. non faciat, nec fieri procurabit. Et si hoc facere recusaverit, tunc ipsam sic recusantem proxim' prison' nostræ in Com' præd' duci facias, &c. ibidem moratur' quousque gratis hoc facer' voluer', &c.* By Force of which Warrant the Def. did arrest the said *Urs.* and that afterwards the Pl. and one *John Hammond*

offered them to go to *Thomas Farmor* Eſquire, one of the Juſtices of Peace of the ſame County to be bound to the Queen according to the Purport of the ſaid Warrant; and that the ſaid *Robert Smith* did refuſe to go to the ſaid *Thomas Farmor*, on which the Plaintiffs went with the ſaid *John Hammond* to the ſaid *Thomas Farmor*, and there acknowledged a Recogniſance to the Queen to appear at the next Seſſions to be held within the Hundred of *Smithden* (which was not according to the Warrant) and that the Defendant *prædict' tempore quo, &c.* by Force of the ſaid Warrant carried the ſaid *Urſula* before the ſaid *Nathaniel*, before whom ſhe refuſed to find Sureties; wherefore the Defendant carried the ſaid *Urſula* to Gaol by Force of the ſaid Warrant. And in this Caſe two Points were reſolved by *Wray* Chief Juſtice and the whole Court.

1. That on the ſaid general Warrant, *ſcil. coram aliquo Juſticiar', &c.* it is at the Election of the Conſtable, who is an Officer and Miniſter of Juſtice, to carry the Party arreſted to what Juſtice he will, for it is more reaſonable to give Election to the Officer, who in Preſumption of Law is a Perſon indifferent, and ſworn to do and execute his Office duly, than to give the Election to the Delinquent himſelf, who by Preſumption of Law will ſeek Excuſes, and perhaps will carry the Conſtable being for the moſt Part a poor Man, to the fartheſt Part of the County, by Reaſon whereof ſuch Conſtable would be more negligent and remiſs of ſuch Warrants for Fear of Travel, and Loſs of their Time. Which Judgment is againſt the Opinion of *Fineux* 21 *H.* 7. 20. *obiter*, whereof the Reporter makes a *Quære*. But it agrees with the Opinion of the Lord *Brook* in Abridging the Caſe of 21 *H.* 7. Tit. *Faux Impriſonment* 11. Note Reader, the Law adjudged in the Point, which never (as I know) was adjudged before.

Lamb. Eir 94.

Br. Peaces, &c. 9. 21 H. 7. 20. b. 21. a. Br. faux Impriſonment. 11.

2. It was reſolved, That after the Officer in the Caſe above, had brought the Party before the Juſtice, and before him ſhe refuſed to find Sureties, if the Officer without a new Warrant or Commandment might carry the Party to Priſon, and that by the Words of the ſaid Warrant, *Et ſi hoc facere recuſaverint, &c.* And *Wray* Chief Juſtice ſaid, That a Juſtice of Peace might in ſuch Caſe make a Warrant to bring the Party before himſelf, and it would be good and ſufficient in Law: For, for the moſt Part, he who makes the Warrant, has beſt Knowledge of the Matter, and therefore moſt fit to do Juſtice in the Caſe.

Mich.

Mich. 32 & 33 Eliz.

In the King's Bench.

GOOCH's *Case*.

BEtween *Rous* Plaintiff and *Gooch* Defendant, as Heir to his Father in Debt, on a Bond made by the Father, in which he bound himſelf and his Heirs; the Defendant pleaded *Riens per Diſcent*; and the Plaintiff maintained Aſſets at *I.* in the County of *Suff.* And at *Niſi prius* before *Wray* Chief Juſtice of *England*, one of the Counſel with the Plaintiff gave in Evidence that his Father was ſeiſed of Lands in *I.* aforeſaid in Fee, and died thereof ſeiſed; and that they deſcended to the Defendant, by which, *&c.* All which was agreed by the other Side: But the Defendant's Counſel gave in Evidence, That long Time before this Action brought, the Defendant had enfeoffed one *W. G.* in Fee of the ſame Lands, which was alſo confeſſed; but the Plaintiff's Counſel alledged and proved, that this Feoffment was made by Fraud and Covin to defraud the Plaintiff of his Action; and therefore void by the Stat. of (*a* 13 *Eliz. cap.* 5. as to the Plaintiff. But it was ſtrongly urged and inſiſted on, That it ought to have been pleaded, and could not on this Iſſue (of *Riens per Diſcent* the Day of the Writ purchaſed be given in Evidence: But on the Importunity of the Plaintiff's Counſel, *Wray* Chief Juſtice directed the Jurors to find the ſpecial Matter; and ſo they did. And now this Term on Argument at Bar and Bench, two Points were reſolved by *Wray* Chief Juſtice, and the whole Court.

1. That the Matter aforeſaid might well be given (*b*) in Evidence for two Reaſons; 1. Becauſe the ſaid Statute provides generally, That the Eſtate as to the Creditor ſhall be void, and Acts of Parliament made in Prevention or Suppreſſion of Fraud ought to have a favourable Interpretation. 2. If this Matter ought to be pleaded, it would be miſchievous to Creditors, and much to the Maintenance and Increaſe of

(*a*) 1 Brownl. 111. 3 Co. 80. b. 6 Co. 18. b. 10 Co. 56. b. Co. Ent. 162. a. Hob. 166. 3 Inſt. 152. 2 Leon. 8, 9, 47, 223, 308, 309. 3 Leon. 57. Latch. 222. 2 Rol. Rep 493. Palm. 415. Cro. El. 645, 233, 234, 810. Dyer 295. pl. 17. 351. pl. 23. 2 Bulſtr. 226. Lane 47, 103. Co. Litt. 3. b. 76. a. 290. a. Raſtal fraudulent Deeds 1. Raſt. Ent. 207. b. Cr. Jac. 270, 271. Moor 638. Yelv. 196, 197

(*b*) Hob. 72. Doct. pla. 200. 2 Rol. 684. 6 Co. 72. b. 2 Inſt. 445.

of a Fraud and Covin; for Fraud and Covin (becauſe they are odious) are ſo privately and ſecretly hatch'd in a hollow Tree, *in arbore cava & opaca*, and ſo artificially covered and concealed that the Party grieved has no Means to find or know it; then to drive the Plaintiff, who is altogether a Stranger to it, to plead the Feoffment (whereof he hath no Knowledge) and that it was made by Fraud, *&c.* would be miſchievous and againſt Law and Reaſon. And Judgment was given for the Plaintiff. And in this Caſe *Wray* Ch. Juſtice ſaid, if *A.* ſeiſed of Land in Fee make a fraudulent Conveyance (to the Intent to deceive and defraud Purchaſers a-
(*a*) 27 El. c. 4. gainſt the Statute of *a* 27 *Eliz.*) and continues in Poſſeſſion, and is reputed as Owner, *B.* enters into Diſcourſe with *A.* for the Purchaſe of it, and by Accident *B.* has Notice and Knowledge of this fraudulent Conveyance, and notwithſtanding concludes with *A.* and takes his Aſſurance of him; in this Caſe *B.* ſhall avoid the ſaid fraudulent Conveyance by the ſaid Act, notwithſtanding his Notice; for the Act has by expreſs Words made the fraudulent Conveyance void as to a Purchaſer; and foraſmuch as it is within the expreſs
(*b*) Co. Lit. 3 b. 76. a. 290. a. b. (*b*) Purview of the Act, it ought to be ſo taken and expounded in Suppreſſion of Fraud. And according to the Opinion of the Lord *Wray*, it was unanimouſly agreed and reſolved by the whole Court of Common Pleas, *Paſch.* 3 *Jacobi* in Evidence to a Jury in an *Ejectione firmæ*, on a
Standen's Caſe, Paſch. 3 Jac. in Comm' Banco. Leaſe made by *Standen* to *Houſe* Plaintiff, againſt *Bullock* Defendant, That where one *Bullock* had made a fraudulent Eſtate of his Land within the ſaid Act of 27 *El.* to *A. B.* and *C.* and afterwards notwithſtanding offered to ſell the ſaid Land to *Standen*, and before Aſſurance thereof made by *Bullock*, *Standen* had Notice of the ſaid fraudulent Conveyance, and notwithſtanding proceeded, and took his Aſſurance of *Bullock*, that *Standen* ſhould avoid (by the ſaid Act) the ſaid fraudulent Conveyance; for the Notice of
(*c*) 3 Co. 82. b. Moor 605, 615. Bridgm. 23. Palm. 217. Lane 22. 2 Jones 95. the Purchaſer cannot make that good which an Act of Parliament made void as to him. And true it is, *Quod non decipitur qui ſcit ſe decipi.* But in that Caſe the Purchaſer is not deceived; for the fraudulent Conveyance whereof he has Notice, is void as to him by the ſaid Act, and therefore ſhall not hurt him, nor is he, as to that, in any Manner deceived.

Mich.

Mich. 32 & 33 Eliz.

In the Exchequer.

SPARRY's *Case*.

Israel Owen brought an Action on the Case against *James Sparry*, of Trover of a certain Quantity of Cotton Yarn, and selling it to Persons unknown, and Conversion to his own Use: The Defendant pleaded, That the Plaintiff had another Action on the Case depending in the King's Bench for the same Trover and Conversion of the same Goods; and this Suit is prosecuted pending the other: And demanded Judgment of the Bill: And thereupon the Plaintiff did demur in Law. And it was resolved by Sir *Roger Manwood* Chief Baron, and the whole Court of Exchequer, that the Bill should (*a*) abate for two Reasons.

(*a*) Dost. pla. 67, 68. Moor 539.

1. Because by the Rule of Law a Man shall not be (*b*) twice vexed for one and the same Cause, *Nemo* (*c*) *debet bis vexari, si constet Curiæ quod sit pro una & eadem causa.* But the old Difference in our Books is between Writs which comprehend Certainty as in Debt, Detinue, &c. And Writs which comprehend no Certainty, as Assise, Trespass, &c. For it is true that in Writs (be they real, personal, or mixt) which are certain, it is a good Plea to say, That the Writ is brought pending another, but in Writs real or personal, where no Certainty is contained, there it is no Plea. As in Assise the Writ is general *de libero tenemento*, and a Writ of Trespass is, *Quare bona & catalla cepit*, &c. generally without any Certainty, either of the Thing, or of the Time, &c. or of any convenient Certainty which may be put in Issue; for the Law requires, *Quod* (*d*) *certa res deducatur in exitum, & non potest constare Curiæ, quod sit pro una & eadem causa.* But in Assise, Trespass, &c. after Plaint or Declaration made, which Plaint or Declaration reduces the Generalty of the Writ to a Certainty, then the Writ purchased after such Plaint or Declaration shall abate, as appears in 14 *E.* 3.

(*b*) Moor 418.
(*c*) 4 Co. 43. a. 8 Co. 118. b. 11 Co. 59. b. 2 Vent. 170. Cr. Jac. 481. Cawly 78. Noy 82. 1 Rol. Rep. 95. Bridg. 122. Wing. Max. 695.

(*d*) Antea 35. a. 38. a. Co. Lit. 96. a. 303. a. Hard. 132. March 98.

Moor 883. *E.* 3. *Brief* 270. adjudged in the Point, where in Aſſiſe of *Novel diſſeiſin* the Ten't pleaded, That the Pl. had another Writ of Aſſiſe depending of the ſame Tenements between the ſame Parties; and ſo this Writ purchaſed pending the other, Judgment of the Writ: And becauſe Plaint was not made in the firſt Writ, ſo that *non poteſt conſtare Curiæ*, of what Tenements he made his Plaint, the Writ was awarded good, and he pleaded to iſſue. And therewith agree 14 *Aſſ. p.* 7. 29 (*a*) *Aſſ. p.* 40. *Vide* 18 *E.* 3. *Brief* 318. A Writ of Reſcous brought pending another ſhall abate, if it be of Record that the Pl. hath declared in the firſt Writ, or otherwiſe not, and (*b*) 39 *H.* 6. 12. *acc'* by *Priſot* in Aſſiſe after Plaint; and in Treſpaſs after Declaration the Plea is good. But in the Caſe at Bar, the firſt Action on the Caſe on Trover and Converſion, be it by Writ or Bill, is here as certain as an Action of Treſpaſs is after Declaration. But the Reaſon in (*c*) 5 *H.* 7. 15. *a. b.* (which as it ſeems the Reporter miſtook) was utterly denied by the Court, where it is ſaid, That becauſe divers Treſpaſſes may be done in one and the ſame Day, therefore it is no Plea (as it is there ſaid) in Treſpaſs, that another Action is depending, *&c.* for the ſame Treſpaſs: For by the ſame Reaſon after the Pl. has recovered in Treſpaſs, and brings his Action for the ſame Treſpaſs again, the Def. cannot aver that it is all for one and the ſame Treſpaſs. But the Book in (*d*) 20 *H.* 6. 44. *b.* 45. *a.* was affirmed to be good Law; where in Forgery of falſe Deeds, the Def. demanded Judgm. of the Writ, becauſe the Pl. had the like Writ of Forgery of the ſame Deeds, to which he had appeared, and this Writ purchaſed pending the other. For the Writ of Forgery of falſe Deeds is general. *Quare diverſa falſa facta fabricavit, vel quodd' falſum fact' fabricavit*: And the Def. had not pleaded that the Pl. had declar'd in the firſt Action whereby the Certainty might appear, therefore *Newton* compared it to a Writ of Treſpaſs and awarded the Def. to anſwer. *Vide* (*e*) 14 *H.* 7. 12. *b.* & 22 (*f*) *H.* 6. 15. *b.* that in an Action of Treſpaſs for a Horſe, which by the Declarat. is reduced to a Certainty, it is a good Plea to the Writ, that there is a Replevin depending of the ſame Taking, where an Averment is allowed, that all is for one and the ſame Taking, and yet there may be ſeveral Takings in the ſame Day, which is againſt the Reaſon of 5 *H.* 7. and agrees with this Reſolut. And therewith agrees alſo the Book in 22 *H.* 6 52. *a.* where the Caſe of Treſpaſs is adjudg'd; for there in Treſpaſs the Def. ſaid that the Pl. had another Writ depending againſt the Def. for the ſame Treſpaſs, on which he had declar'd, Judgm. of that Writ brought pending the other, and *Newton* and the whole Court awarded that the Writ ſhould abate. Note, there it is Part of the Plea to the Writ, that the Pl. had declar'd, by which he had made the Thing certain; and that is the Differ. between this Caſe and the Caſes in (*g*) 20 *H.* 6. 44. & 5 (*h*) *H.* 7. 15. *a. b.* for the principal

(*a*) Br. Brief 300. Br. Aſſiſe 299.

(*b*) Br. Brief 259. Fitz. Brief 142

(*c*) Doct. pla. 68. Br. Brief 321.

(*d*) Fitz. Brief 87.

(*e*) Br. Treſpaſs 171. 14 H. 7. 12. b. 13. a.

(*f*) Fitz. Treſpaſs 59. Br. Treſpaſs 152. Br. Brief 188.

(*g*) 20 H. 6. 44. b. 45. a. Fitz. Brief 87.

(*h*) Doct. pla. 68. Br. Brief 321.

principal Case in 5 *(a) H.* 7. was affirmed to be good Law, for there it was not Part of the Plea that the Pl. had declared. And the Case at Bar was stronger, for it shall not be intended that there were divers Sales and Conversions in one and the same Day. Also it was resolved, that although the first Action was in another Court, *scil.* in the King's Bench, or *vice versa*, that the Plea is good. *Vide* 43 *(b) E.* 3. 27. *a. acc.* and that the Book in 34 *E.* 3. *Brief* 789. is good Law; for it doth not appear by the Plea, that the Plaintiff or Defendant was privileged in the Exchequer, and then by the Statute of *Articuli super Chartas*, *cap.* 4. it is enacted, that no common Plea shall be held in the Exchequer: But in 43 *E.* *(c)* 3. 27. *a.* it appears that the Def. was privileged in the Exchequer, and therefore the Plea to the Writ there was good. But if a Man brings an Action of Debt by Bill in *London* or *Norwich*, or in any other inferior Court, and afterwards brings an Action of Debt in the Common Pleas, this Suit in the higher Court, which is brought pending the Suit by Bill in an inferior Court, shall not abate, as appears in 7 *(d)* *H.* 4. 8. *a.* & 3 *(e)* *H.* 6. 15. *a. b. Vide* 43 *E.* 3. 22, 27. & *(f)* 7 *H.* 4. 44. *a. b. Briningham's* Case. But it is said 9 *E.* 4. 53. *a.* that all the King's Courts at *Westminster*, have been Time out of Mind, &c. and so a Man cannot tell which of them is the most antient Court.

And afterwards it was adjudged that the Plea was good, and the Pl. took nothing by his Bill. And so note Reader, all the Books which *prima facie* seem to disagree, are on full and solid Reason unanimously agreed and reconciled.

(a) 5 H. 7. 15. a. b. Doct. pla. 68. Br. Brief 321. Antea 61. b.

(b) Fitz. Bar. 197. Br. Debt. 35. Br. Brief 66.

(c) Supra.

(d) Fitz. Brief 225. Br. Brief 108. Br. Estoppel 54.

(e) Br. Estoppel 1. Br. Brief 8. Fitz. Estoppel 15.

(f) Fitz. Action sur le Case 26. Br. Action sur le Case 37.

Cases

Cases of By-Laws and Ordinances.

Mich. 32 & 33 Eliz.

In the King's Bench.

The Chamberlain of London's *Case.*

3 Leon. 264, 265.
4 Rol. 365.

THE Chamberlain of *London* brought an Action of Debt in *London* in the *Guild-Hall* there against divers Persons, &c. And it was grounded on an Act of Common Council, or Ordinance made by the Mayor, Aldermen and Commonalty of the City at their common Assembly (which they make by Custom, and which amongst others is confirmed by divers Acts of Parliament) by which it was ordained, That if any Citizen, Freeman or Stranger within the said City put any Broad-cloth to sale within the City of *London* before it be brought to *Blackwell-Hall* to be viewed and searched, so that it may appear to be saleable, and that Hallage be paid for it, *scil.* 1 *d.* for every Cloth, that he shall forfeit for every Cloth 6 *s.* 8 *d.* And further it was ordained, For such Forfeiture the Chamberlain of the City of *London* for the Time being should have an Action of Debt, &c. And because the Defendants had broke the said Ordinance, for the Penalty inflicted by the said Ordinance, the Chamberlain of *London* brought an Action of Debt in *London*, and it was removed by *Corpus cum Causa* into the King's Bench. And it was moved that those of *London* could not make Laws and Ordinances to bind the King's Subjects, and principally Strangers, for then they wou'd have as high Authority as an Act of Parliament: And 2. The said Ordinance (as it was urged) was against the Law, and the Freedom and Liberty of the Subject, to compel him to bring his Cloths to any one Place. 3. The Impost. of 1 *d.* for Hallage was a Charge to the Subject, and by the same Reason that they may impose 1 *d.* they may impose 2 *d.* and so *in infinit'*.

And one of the Inner Temple of Counsel with the City moved to have a *Procedendo*. It appears by many Precedents, That it hath been used within the City of *London* Time out Mind, for those of *London* to make Ordinances and Constitutions for the good Order and Government of the Citizens, &c. consonant to Law and Reason, which they call Acts of Common Council. Also all their Customs are confirmed by divers Acts of Parliaments, and all such Ordinances, Constitutions or By-Laws are allowed by the Law, which are made for the true and due Execution of the Laws or Statutes of the Realm, or for the well Government and Order of the Body incorporate. And all others which are contrary or repugnant to the Laws or Statutes of the Realm are void and of no Effect: And as to such Ordinances and By-Laws, these Differences were observed; Inhabitants of a Town without any Custom may make Ordinances or By-Laws for the Reparation of the *(a)* Church, or a Highway, or of any such Thing which is for the general Good of the Publick; and in such Case the greater Part shall bind the whole without any Custom. *Vide* 44 *E.* 3. 19. But if it be for their own private Profit, as for the well ordering of their *(b)* Common of Pasture, or the like, there without a Custom they cannot make By-Laws: And if there be a Custom, then the greater Part shall not bind the less, if it be not warranted by the Custom. For as Custom creates them, so they ought to be warranted by the Custom. *Vide* 8 *E.* 2. *Assise* (c) 413. Also Corporations *(d)* cannot make Ordinances or Constitutions without a Custom, or the King's Charter, unless for Things which concern the publick Good, as Reparations of the Church or common Highways, or the like. *Vide* 44 *E.* 3. 19 8 *E.* 2. *Assise* 413. 21 *E.* 4. 54. 11 *H.* 7. 13. 21 *H.* 7. 20. & 40. 15 *Eliz. Dyer* 322.

(a) Postea 67. b. Hob. 212. 1 Mod. Rep. 194.

(b) Cr. Car. 498. 1 Anders. 234. 1 Leon. 190. Hob. 212. Goldsb. 79. Carter 178.

(c) 2 Brownl. 179. 3 Leon. 265. Hob. 212.

(d) 1 Rol. 513. Hob. 211.

And as to the Case at Bar many Statutes were made for the true Making of woollen Cloth, which is the principal Commodity of this Realm; and to the Intent that the said Statutes might be the better executed without any Deceit, the said Act of Common Council was made, that they shall be brought to *Blackwell-Hall*, as to a Place publick, and known, to the Intent they might be searched and viewed, if they were made according to the said Stat. So the said Ordinance being made for the better Observat. and Execut. of the said Laws, to prevent all Frauds and Falsities, was good (e) and allowable by the Law. Also the Assessing of the said (f) 1 *d.* per Hallage was good, because it was *pro bono publico*, and it was competent and reasonable, having regard to the Benefit

(e) 1 Rol. 365. 3 Leon. 264, 265. Hob. 212. Mo. 580. 2 Jones 145. 8 Co. 127. b. Bridg. 140, 141. Pollexfen's Arg. Cro. Arg. 22.

(f) 8 Co. 127. b. 2 Brownl. 287, 288. Hard. 56, 210. Pollexfen's Argument in Quo Warranto 81. Hardr. 56, 210. Lane 24. Rol. Rep. 115. Trebie's Argument in Quo Warranto 33. Rol. 365.

which

which the Subject enjoyed by Reason of the said (*a*) Ordinances; and such Assessm. being for the Maintenance of the publick Good, and not *pro privato lucro*, were maintainable by the Law; and it was not to be called a Burthen or Charge to the Subject when he reaps a Benefit by it. But it is like Pontage, Murage, Toll, and the like, as appears in 13 *H.* 4. 14. b. in which Cases the Sum for Reparations of Bridges, Walls, *&c.* ought to be so reasonable, that the Subject shall have more Benefit thereby than Charge.

(*a*) 11 Co. 54. a.

Also the Penalty inflicted on the Offender, be he Citizen or Stranger, was lawful, the Offence being committed within the City, and the Sum being competent and proportionable to the Offence, and without a Penalty the Ordinance would be in vain; for (*b*) *Oderunt peccare mali formidine pœnæ*. And the Appointment of their (*c*) Chamberlain, being their publick Officer of Debt to bring the Action of Debt was good, and allowable by Law; and the Ordinance being according to Law, may be put in Execution without any other Allowance, (*d*) notwithstanding the Statute of 19 *H.* 7. *cap.* 7.

(*b*) 3 Leon. 265.
(*c*) 1 Rol. 366.
(*d*) 1 Rol. 363.

And after great Deliberation *Wray* Chief Justice, by the Advice of the other Justices, granted a *Procedendo*. *Vide* 2 (*e*) *E.* 3. 7. *John de Brittain's Case*. The King may grant by his Charter, that all Manner of Ships coming to such a Haven laden with Merchandizes, shall be unladen at a certain Place, and not elsewhere, to the Intent he may be better answered his Customs and other Duties.

(*e*) Hard. 55. 2 Brownl. 179, 278. 1 Rol. Rep. 5. Palm. 3.

Tri

Trin. 38 Eliz.

In the Common Pleas.

CLARK's *Case.*

IN an Action of false Imprisonment brought by *Clark* against *Gape*; the Defendant justified the Imprisonment, because King *E.* 6. incorporated the Town of St. *Albans* by the Name of Mayor, *&c.* and granted to them to make Ordinances: And shewed, that the Queen appointed the Term to be kept there, and that they with the Assent of the Plaintiff and other Burgesses, did assess a Sum on every Inhabitant for the Charges in erecting the Courts there; and ordained, That if any should refuse to pay, &c. that he should be imprisoned, *&c.* and because the Plaintiff being a Burgess, *&c.* refused to pay, *&c.* he as Mayor justified; And it was adjudged no Plea, for this Ordinance is against the Statute of *Magna Charta, cap.* 29. *Nullus liber homo imprisonetur*; which Act hath been confirmed and established above 30 Times, and the Plaintiff's Assent cannot alter the Law in such Case: But it was resolved, that they might have inflicted a reasonable Penalty but not Imprisonment, which Penalty they might limit to be levied by Distress, or for which an Action of Debt lay, and the Plaintiff had Judgment.

1 Rol. 363, 366, 367, 599. 1 Jones 162. 8 Co. 127. b. 2 Bulstr. 328. Stile 85. Moor 411, 412, 580. 2 Inst. 54, 702. Cr. Argument 22. Bridg. 141, 112. 2 Brownl. 288. Hob. 61.

De

De termino Sancti Michaelis, Anno regni Dominæ Eliz. *Reginæ Angliæ* 31 & 32 *Rotulo* 447.

JEFFREY's *Caſe.*

MEmorandum, quod die Lunæ proxim' poſt menſem ſancti Michaelis iſto eodem termino, coram Domina Regina apud Weſtmonaſter', ven' Willihelmus Jeffrey generoſus in propria perſona ſua, & dat cur' dict' Dominæ Regin' nunc hic intelligi, quod cum ſecundum legem terræ & conſuetudinem hujus Regni Angl', a tempore cujus contraria memoria hominum non exiſtit, infra idem Regnum habit', & uſitat', inhabitant' & reſident' infra aliquam parochiam infra regnum præd', infra quam quidem parochiam aliqua eccleſ' parochial' extitit, eccleſ' ill' ſumptib' ſuis propriis quoties neceſſe fuerit repar', & a toto tempore ſupradict' reparare conſuever' & debuer', & quod quælibet alia perſona ſeu perſonæ inhabitans, ſeu inhabitant' extra paroch' illam in aliqua alia paroch', de factione hujuſmod' reparation' a toto tempore ſupradict' exonerat' & acquietat' fuer', cumque etiam per legem terræ & conſuetudinem præd' non licitum ſit, alicui perſonæ ſive aliquibus perſonis, imponere aliquam compoſition' ſive taxationem ſuper aliquam perſonam non inhabitantem in aliqua paroch', ubi hujuſmodi Eccleſia reparand' ſit, in reſpect' ſeu ration' aliquor' terr' ſive tenementor', quæ eadem perſona tenet vel occupat in ead' parochia ubi hujuſmodi eccleſia reparanda ſit, ut ſupradict' eſt pro reparatione alicujus talis eccleſiæ ſic irreparat' ſine aſſenſu ſuo, cumqne etiam triatio & determinatio cauſæ præd' ſit materia terminabilis ad communem legem, & non per jura ſeu cenſuras Eccleſiaſtic' quoviſmodo triari, terminari, & diſcuti debeat, nec a tempore cujus contrarii memoria hominum non exiſtit conſuevit: Quid' tamen Abrah' Kenſhley & T. Foſter Gardian' ſive œconomi paroch' de Haleſham in com' Suſſex' afferint præmiſſor' non

non ignari falſo & ſubdole prætend' præd' Will' Jeffrey fore inhabitantem infra paroch' de Hayleſham prædict' (ubi revera prædict' Willihelmus Jeffrey eſt, & ſemper fuit inhabitans infra paroch' de Chiddingley in comitatu Suſſex, & nunquam fuit inhabitans infra parochiam de Hayleſham prædict') ac eandem Eccleſiam de Hayleſham præd' per tenen' & proprietarios terrar' & tenmentor' infra eand paroch' reparari oportere & debere, machinan' dictam Dominam Regin' nunc & coronam ſuam regiam exhæreditare, cognitionemque placit' quæ ad dict' Domin' Regin' nunc & coron' ſuam regiam, & non ad Cur' Chriſtianitat' in hac parte pertinet, ad aliud examen in Cur' Chriſtianitatis, traher' ipſum Willihelmum Jeffrey in Cur' Chriſtianitatis præd' coram Johanne Drury legum Doctore, in & per totum Archim' Lewen reverend' in Chriſto patris Dom' Thomæ provident' divin' Ciceſtren' Epiſcop' officiali principali rite deputat' ad promotionem prædictorum Abrahami & Thomæ Foſter in hac parte, de & pro quadam taxatione ſuper ipſum Willihelmum Jeffrey ad & circa reparationes Eccleſiæ de Hayleſham prædictam impoſit' citari fecer': Ac eundem Willihelmum in cur' Chriſtianitat' præd' coram præfato Judice ſpirituali, comparere, eundemque Willihelmum ſic comparentem ad reſpondend' quibuſdam articulis de & pro taxatione prædict' videlicet de eo quod idem Will' Jeffrey ſcivit, credidit, vel audivit qd' infra Archim' Lewen in com' prædict' fuit quædam Eccleſia communit' vocat' **The Parish Church of Hayleſham**: Et qd' eadem Eccleſ. parochial' in quamplur' partibus ejuſd' Eccleſiæ tam in tegumento quam in cooperimento ejuſdem quam aliis indiguit & indigebat: Ita ut niſi repararet', ruinam pati verend' fuiſſet, quodq; tam de jure communi quam de antiqua laudabili & præſcripta conſuetudine, necnon a tempore & per temp' cujus contrarii memoria hominum non exiſtit inviolabilit' & inconcuſſe uſitat' & obſervat' fuit infra paroch' de Hayleſham prædict' quod omnes & ſinguli parochian' reparation' Eccleſ. alicujus irreparat' intendent' juxta ratam & qualitatem poſſeſſion' in eadem paroch' habent' vel occupant', cuilib' infra dict' paroch' poſſeſſiones habend' & obtinend' collection' ſive taxation' imponere potuiſſent & debuiſſent. Ac etiam qd dict' Eccleſ. matura deliberat' præhabit' non minor' ſumm' ſexagint' decem libr' legal' monet' Angl' ſufficient' reparari potuit, necnon qd' Guardiani Eccleſ. paroch. de Hayleſham prædict' pro tempore exiſten' anno Domini milleſimo quingenteſimo octogeſimo nono & duobus annis tunc proxim' præteritis, de & in conſenſu omnium parochianor' de Hayleſham prædict', ſeu majoris & melioris partis eorund' quandam contribution' juxta quantitatem & qualitat' poſſeſſion' prædict' & reddit' infra dict' paroch' exiſten' in præd' Eccleſiæ reparation', poſſeſſion'

præd', ſeu reddit' in ead' paroch', omnib' & ſingul' habend' & obtinend', imponend' & de eiſd' taxand' decreviſſent, diemq; & locum pro hujuſmodi contribut' & taxatione faciend' ſtatuiſſent; quodq; eod' die, quo dict' contributio imponenda foret præceden' omnib' parochianis præd', necnon forenſibus, terras præd' poſſeſſion', ſeu reddit' in paroch' de Hayleſham præd' habend' & obtinend', in dict' parochia de Hayleſham præd' necnon in foro publico ibid' adfuiſſet concurſus populi quibus die & loco contributio præd' & taxatio faciend' & imponend' eſſet. Ac quod die & loco ſtatut' pro impoſitione præd' taxationis, ſive contributionis, ill' Gardiani, necnon parochiani dict' parochiæ ad hujuſmodi contribution', ſive taxation' faciend' proceſſer'. Ac ſumm' quatuor denar' de qualib' acr. voc' **Marſh-land**: necnon ſummam duorum denar' legalis monet' Angl' de qual. acr. terr. voc' **Upland**, infra dict' paroch' de Hayleſham præd' exiſten', in reparation' dict' Eccleſ. per habentes & occupatores dictar' acr. dict' Gardianis ſolvend' impoſuer'. Necnon qd' idem Willielm' trigint' acr. Mariſci voc. **Marſh ground**, & centum acr. terr' voc' **Upland**, infra paroch' præd tenuit, occupavit, ſeu reddit' pro eiſd' adtunc recepit. Ad qd' ſummæ ab occupatoribus & habentibus poſſeſſion' præd', ſive reddit' infra dictam paroch' de Hayleſham præd' juxta collection', ſive taxation' præd' levand' & colligend' non ultra ſummam quinquagint' libr' legalis monet' Angl' extendebant, ſub nomine & colore officii ſui (ut præfertur) de & in præmiſſis reſpondere minus juſte aſtrinxit. Ac licet idem Willielm' Jeffrey materiam præd' ſuperius content' in Cur' Chriſtianitat' præd' coram præfat' judice ſpiritual' in exoneration' ſuam in præmiſſis ſæpius pl'itaverit, allegaverit, & illa inevitabili veritate & teſtimon' probare obtulerit, quodq; ipſe per legem terræ in form' præd' citari non debuiſſet, pro ſolutione præd' ſummæ ſuper ipſum Willielm' Jeffrey, pro reparationib' Eccleſ. de Hayleſham præd', ut præfertur taxat', ac qd' taxatio præd' pro reparationib' Eccleſ. in caſu præd' exiſtit materia terminabil' ad communem legem & non in Cur' Chriſtianitat': dict' tamen judex ſpiritualis pl'itum, & allegac' illam admittere penitus recuſavit, ac præd' Abraham & Thom' Foſter ipſum Willihelm' Jeffrey in Cur' Chriſtianitat' præd' in præmiſſis condemnari, ac ad ſolvend' præd' ſeparales denar' ſummas ſuper ipſum Willihelm' Jeffrey pro reparatione Eccleſiæ præd' ſuperius in hac parte ſpec' impoſit' & taxat' quas ipſe per legem terr' (ut præfertur) ſolvere occaſione præd' non debeat, ſeu tenetur facere per definitivam dict' Cur' Chriſtianitat' ſententiam totis ſuis virib' conantur & indies machinant', in dict' Dom' Reg' nunc contemptum, & ipſius W. Jeffrey damnum, præjudic', depauperation', & gravamen manifeſt', & contra legem terræ præd': Et hoc idem W. Jeffrey parat' eſt verificare, unde idem Will' Jeffrey auxilium

&

& munificenc' cur' dictæ Dom. Reg. nunc hic humillime implorando pet' remedium, & b're Dom' Reginæ de prohibitione præfat' judici ſpirituali in forma præd', ad prohibend' ipſum ne ipſe pl'itum præd', præmiſſ. quoviſmodo tangen', coram eo ulterius teneat. Et ei conceditur, &c. Et ſuper hoc ven' Johannes Porter de Chiddingly in com' Suſſex armiger, & Thomas Aynſcombe de Buxted in com' præd' gen', in propriis perſonis ſuis, & manuceper' pro præfat' Will. Jeffrey, qd' ſi conting' præd' Abr' Kenſhley & Tho. Foſter ad cur' Dom' Reg' hic impoſter' accedere ad b're Dom' Reg. de conſultatione impetrand', ſeu aliter. Juſtic' ibid' de & ſup' præmiſſ. proſequend', qd' tunc idem Will' dict' materiam ſive ſuggeſtionem proſequatur cum effectu, quouſq; placit' inde aliquo legitimo modo terminent', videlicet, uterq; manucapt' præd' ſub pœna decem libr', quam quidem ſummam decem libr', præd' manucapt' cogn' & uterque eorum per ſe cogn', de terræ & catall' ſuis & eorum cujuſlibet fieri, & ad opus dict' Dom' Reginæ levari, ſi conting' dict' Will. præmiſſ. non proſequi in form' prædict' cum effectu, &c.

Mich. 31 & 32 Eliz.

In the King's Bench.

JEFFREY's *Case.*

Cr. El. 659.
Hob. 212.
1 Mod. Rep 261.
Hardr. 379.

William Jeffrey Gent. brought a Prohibition against *Abraham Kenshtey* and *Thomas Foster*, and declared, that by the Law of this Realm, the Parishioners of every Parish where they are dwelling ought to repair their own Church, and not the Parishioners of any other Parish, &c. The said *Thomas* and *Abraham* being Churchwardens of the Parish of *Haylesham* in the County of *Sussex*, had sued the Plaintiff in the Spiritual Court before Doctor *Drewry* in the Diocese of *Chichester* for certain Monies imposed on the said *William Jeffrey* without his Assent for 30 Acres of Marsh, and 100 Acres of Land which the said *William Jeffrey* had, and occupied in the said Parish of *Haylesham*, for the Reparation of the Church of *Haylesham*, and had constrained him to answer to certain Articles, *scil.* that the said Church was in Decay, and that it could not be repaired for less than 70*l.* And that the said Churchwardens of the said Church for the Time being, *anno Dom.* 1589, and two Years before, with the Assent of the greater Part of the Parishioners of the said Parish, *juxta quantitatem & qualitatem possession' & reddit' infra dict' parochiam existen'*, determined and agreed to make a Taxation for the Repair of the said Church; and that Notice of such Meeting was given in the said Church, and also proclaimed in the Market; and that at the Day so appointed, the Churchwardens and the greater Part of the Parishioners of *Haylesham* who were there met together, made a Tax, *scil.* of every Acre of Marsh-Land 4 *d.* and of every Acre of arable Land 2 *d.* to be paid by the Occupiers of them in *Haylesham* aforesaid; and that the said *William Jeffrey* the said 30 Acres of Marsh, and 100 Acres of Land occupied, or received Rent for them; and that all the said Tax of the said Town did not exceed the Sum of 50*l.* And further declared, that the said *Will. Jeffrey* was at the Time of the said Tax, and long Time before, and yet is an Inhabitant of the Parish of *Chiddingly* within the said County of *Sussex*, and never did inhabit within the Parish of

of *Hayleſham*, and that he had pleaded the ſaid Matter in the Spiritual Court, and the Judge refuſed to allow it. And on this Declaration, *Coke* of Counſel with the Defendant did demur in Law. And after many Arguments at the Bar and Bench it was adjudged, That a Conſultation ſhould be granted. And in this Caſe theſe Points were reſolved.

1. That the Spiritual Court (*a*) has Conuſance *de reparatione corporis ſive navis Eccleſiæ*; and that appears by *Britton* who wrote in 5 *E.* 1. *lib.* 1. *cap.* 4. *fol.* 11. and in the Stat. *de circumſpecte agatis, &c.* but *in rebus manifeſtis errat qui authoritates legum allegat, quia perſpicue vera non ſunt probanda*, becauſe he who endeavours to prove them obſcures them. And it was objected, That the Reaſon why every Pariſhioner is charged to the Reparations of the Church, and to provide convenient Ornaments in it for the greater Convenience and Honour of Divine Service, is firſt for the ſpiritual Comfort which he has in Hearing the Word of God there for his Inſtruction in the true Way to Heaven in Celebration of the Sacraments, and in preſenting to God their Prayers, not only privately, but with the great Congregation to be thankful to God for all his Benefits, and to deſire of him all Things neceſſary, *&c.* in Reſpect of which ineſtimable Benefits, he is chargeable to repair his own proper Church in which he receives them. But ſhall not be bound to the Reparat. of any other Church in another Pariſh in which he doth not inhabit. And the Deſcription of this Word (*Parochia*) was obſerved, *Parochia eſt locus in quo degit popul' alicujus Eccleſ.*

(*a*) 2 Rol. 289.

(*b*) 2 Inſt. 487, 488, &c.

2. It was objected, That it would be hard to charge the ſaid *Jeffreys* to ſuch Tax, becauſe he was dwelling in another Town, and never conſorted with them of *Hayleſham* at any of their Aſſemblies or Aſſeſſments for ſuch Purpoſes.

3. It was objected, That the Libel in the Spiritual Court againſt the ſaid *William Jeffrey* was in the Disjunctive, that the ſaid *William Jeffrey* occupied the ſaid Lands, or received Rent for them, on which Libel if *Kenſhley* and *Foſter* ſhould have a Conſultation, although *Jeffrey* doth not occupy the Lands himſelf, but a Farmer in *Hayleſham* who pays to him Rent, that yet *Jeffrey* might be charged, which would be againſt Law and Reaſon, and againſt the common Experience of all *England*. It was anſwered and reſolved firſt, That although the Houſe wherein *Jeffrey* dwelt be in another Pariſh, yet foraſmuch as he had Lands in the Pariſh of *Hayleſham* in his proper Poſſeſſion and Manurance, he is in Law *Parochianus de Hayleſham*. For the Place where he lies, ſleeps, or eats, doth not make him Pariſhioner only; but alſo foraſmuch as he manures Lands in *Hayleſham*, and by that is reſident upon it, that makes him

The Reſolution of the Court.

2 Rol. 289. Cr. El. 659, 843. 2 Rol. Rep. 262. 2 Inſt. 653. 702. Winch. 53. 2 Brownl. 10. 1 Bulſtr. 20. 2 Saund. 423. Salk. 164. Comb. 151.

him a Pariſhioner of *Hayleſham* alſo as to this Purpoſe.

2. If in this Caſe *Jeffrey* ſhould not be charged to the Reparation of the Church of *Hayleſham*, for thoſe Lands which he himſelf occupies there, no Perſon would be charged for them, upon which great Inconven. would enſue; for one who inhabits in the next Town, may occupy the greateſt Part of the Lands in another Town; and ſo Churches in theſe Days will come to Ruin: But it was reſolved, when there is a (*a*) Farmer of the ſame Lands, the Leſſor who receives Rent for them ſhall not be charged for them in Reſpect of his Rent, becauſe there is an Inhabitant and Pariſhioner who may be charged; and the Receipt of the Rent doth not make the Leſſor a Pariſhioner.

(*a*) 2 Rol. 289. Cr. El. 659. 3 Roll Rep. 270.

3. In this Caſe the Charge is on the Perſon, and not on the Land, but is on the Perſon in Reſpect of the Land, for the more Equality and Indifferency. *Vide Regiſt. 44. b. inter conſultation'. Conſultatio ad procedend' contra parochianos ſuper emendationem corporis ſive navis Eccleſ. &c. ubi prohibitio de laico feodo prius porrecta fuit*, which is to be intended when the Tax was of the Perſon in Reſpect of his Lay-Fee.

4. Altho' he dwells in another Town, yet foraſmuch as in Judgm. of Law he is an Inhabitant and Pariſhioner of *Hayleſham*, he may come, if he will, to the Aſſemblies of the Pariſhioners of *Hayleſham*, when they meet together for ſuch Purpoſes: And Sir *Chriſt. Wray* Ch. Juſtice ſaid, That foraſmuch as the Conuſance of the Reparations of Churches doth not belong to the Spiritual Court, it was neceſſary to hear the Opinion of thoſe who profeſs the Eccleſiaſtic' Law as to this Point; and ſo it was done. And thereupon divers of them under their Hands in Writing did certify their Opinions, That *Jeffrey* by their Law was a Pariſhioner of *Hayleſham* as to this Purpoſe, and chargeable to the Reparations of the (*b*) Church of *Hayleſham*: And that the Churchwardens and greater Part of the Pariſhioners (on ſuch general Warning) met together, might make ſuch a Tax by their Law, and that it don't charge the Land but the Perſon in Reſpect of the Land for Equality and Indifferency.

(*b*) 1 Mod. Rep. 164. Hob. 212. Bridg. 63. a.

5. As to the Objection, that the Libel was in the Diſjunctive, &c. It was anſwered and reſolved, That altho' the (*c*) Libel be ſo, yet the Defendants ſhould have a ſpecial Conſultation only in Reſpect of ſuch Lands which the ſaid *W. Jeffrey* at the Time of the ſaid Tax had in his own Hands, and ſo much the rather becauſe the ſaid *Jeffrey* has confeſſed in his Declarat. on the ſaid Prohibit. that he himſelf at the Time

(*c*) Hob. 115, 134.

of the ſaid Tax, &c. had the ſaid Lands in his own Occupation. And a ſpecial Conſultation was awarded: And this was the firſt leading Caſe that ever was adjudged and reported in our Year-books as to this Matter.

And afterwards *Paſch.* 41 *Eliz.* between *Paget* and *Baump* in the King's Bench in the Time of *Popham* Ch. Juſtice, the Point came again in Queſtion on a like Tax, a Prohibition being obtained after many Arguments and great Deliberation, at length on View of the Record of this Caſe at Bar, which was adjudged in the Point, it was reſolved again by *Popham* Chief Juſtice and the whole Court, that a Conſultation ſhould be granted according to this Judgment; and now it is generally allowed and received for Law. Cr. El. 659.

This is a good Caſe to many Purpoſes, and therefore obſerve well the Conſequences of it.

Mich. 33 & 34 Eliz.

In the Court of Wards.

The Lord CHEYNEY's *Caſe.*

SIR *Thomas Cheyney* Knight Lord Warden of the Cinque Ports, 1 *Eliz.* made his Will in Writing, and thereby deviſed to *Henry* his Son divers Manors, and to the Heirs of his Body, the Remainder to *Thomas Cheyney* of *Woodley*, and to the Heirs Males of his Body, on Condition *that he or they, or any of them ſhall not alien, diſcontinue*, &c. And it was a Queſtion in the Court of Wards, between Sir *Thomas Perot* Heir general to the Lord Warden, and divers of the Purchaſers of Sir *Tho. Cheyney*, if the ſaid Sir *Tho.* ſhould be received to prove by Witneſſes that it was the Intent and Meaning of the Deviſor to include his Son and Heir within Moor 727, 728. Wing. Max. 15.

these Words of the Condition (*he or they*) and not only to restrain *Thomas Cheyney* of *Woodley* and his Heirs Males of his Body: But *Wray* and *Anderson* Ch. Justices on Conference had with the other Justices resolved, That he should not be received (*a*) to such Averment out of the Will, for the Will concerning Lands, &c. ought to be in Writing, and the Constructions of Wills ought to be collected from the (*b*) Words of the Will in Writing, and not by any Averment out of it; for it would be full of great Inconvenience, that none should know by the written Words of a Will, what Construction to make, or Advice to give, but it should be controlled by collateral Averments out of the Will: But if a Man has (*c*) two Sons both baptized by the Name of *John*, and conceiving that the Elder (who had been long absent) is dead, devises his Land by his Will in Writing to his Son *John* generally, and in Truth the Elder is living, in this Case the Younger Son may in Pleading or in Evidence alledge the Devise to him, and if it be denied, he may produce Witnesses to prove his Father's Intent, that he thought the other to be dead; or that he at the Time of the Will made, named his Son *John* the Younger, and the Writer left out the Addition of the Younger: For in 47 *E.* 3. 16. *b.* the Case was; *Robert Peynel* had Issue two Sons baptized by the Name of *William*, and (*d*) levied a Fine to Sir *John Fanningbridges* and others *come ceo*, &c. who granted and rendered to *Robert* and *William* his Son generally; and after the Death of *Robert*, *William* the younger Son brought a *Scire facias* against the Heir of *William* the Elder; and the Younger by the Rule of the Court averr'd that the Fine was levied to make him Heir ready, and upon that Issue was taken. And no Inconvenience can rise if an Averment in such Case be taken in Case of a Devise, by Will, for he who sees such Will, whereby Land is devised to his Son *John*, cannot be deceived by any secret invisible Averment; for when he sees the Devise to his Son *John*, he ought at his Peril to inquire which *John* the Testator intended, which may easily be known by him who wrote the Will, and others who were privy to his Intent; and if no direct Proof can be made of his Intent, then the Devise is void for the Incertainty, as the Render also would be in the said Case of the Fine, as to *William*, for the Law will not make the one or the other by Construction inheritable, for neither the elder Son shall have it by Course of Law, because the Elder need not have an Addition, nor shall the Younger have it by Construct. by Reason the Father need not have limited the Land to the Elder, because the Land after the Death of the Father would descend to the Elder. But he shall have it whom the Father intended to advance with it, and for Want of Proof of such Intent, the Will or the Render for the Incertainty (as hath been said) is void; and so the Doubt in 11 *H.* 6. 13. well explained.

(*a*) 1 Rol. 422. Wing. Max. 15.

(*b*) 4 Co. 4. a. Latch. 42. Jenk. Cent. 115. Cr. El. 498. Moor 222. 2 Bulstr. 177, 178. Bridg. 135. Godb 432. Lit. Rep. 186. Hutt. Arg. 49, 50. Stile 293, 294. Wing. Max. 22. Raym 410, 411. 2 Leon. 70. 1 Brownl. 132, 191. Salk. 235.

(*c*) 1 Brown. 132. Stile 293. Moor 105. 2 Leon. 217. Swinb. 108. Hob. 32.

(*d*) 8 Co. 155. a. Br. Nosm. 63. Cr. Eliz. 531. Br. Fine 28. Fitz. Feoffm. 56 Kelw. 49. a.

(*e*) 1 Bulstr. 62. Swinb. 108.

Cases

Cases of Usury.

Mich. 33 & 34 Eliz.

In the King's Bench.

BURTON's *Case.*

IN a Replevin brought by *Humphrey Burton* against *H. H.* he avowed, because *Tho. Woodhouse* Esq; was seised of the Place where, &c. containing 10 Acres in *Hicklyn* in the County of *Norfolk*, *inter alia*; and so seised 17 *Julii anno* 21 *Eliz.* by his Deed granted to *A. G.* Esq; a Yearly Rent of 20 *l.* issuing out of the Place where, &c. *inter alia*, to perceive to him and his Heirs at the Feasts of the Nativity of Christ and St. *John Baptist* Yearly to be paid; The first Payment to begin at the Feast of the Nativity of Christ, which shall be in *Anno Domini* 1580. And afterwards *A.* by Deed acknowledged before Justices of Peace, and Clerk of the Peace of the said County, and enrolled according to the Statute, did bargain and sell the said Rent to the Defendant and his Heirs, who for the Rent behind did avow: The Plaintiff in Bar of the said Avowry, pleaded the Statute of Usury, and alledged, that the said 17 *Julii*, *anno* 21. *inter eosdem Thomam Woodhouse*, & *A. G. taliter concordatum fuit per viam corruptæ barganiæ*, scil. *quod prædictus A. mutuo daret præfat' Thomæ Woodhouse centum libras*, & *quod idem Thomas concederet* to the said *Anthony* and his Heirs the Rent of 20 *l.* under Condition, That if the said *Thomas* should pay to the said *A.* 100 *l.* 17 *Julii*, 1580. that then the said Rent should cease; on which corrupt Agreement *Thomas* there then received the said 100 *l.* and there then granted the said Rent accordingly

37 H. 1. c. 9.
13 El. c. 8.
Co. Lit. 3. b.

ingly under such Condition as is aforesaid, according to the said Agreement; *Qui quidem annuus redditus pro præd' 100l. in forma præd' solubil' excedit secundum rat' 10l. pro 100l. pro uno anno, contra formam Statuti, &c.* and conveyed a Lease of the Land to the Plaintiff for 21 Years. And note the Distress was taken 27 *Decemb. anno* 33. for 20*l.* behind at *Midsummer* then past; upon which the Avowant did demur in Law; and Judgment was given for the Avowant. For altho' it was objected, That the Plaintiff in his Bar to the Avowry hath alledged, that the said Grant was on a corrupt Contract against the Statute, and the Avowant hath demurred thereupon, by which he hath confessed all Matters in Fact, yet because on the Matter disclosed in the Bar, it appears to the Court, that it was not a corrupt Contract against the said Statute, and so his Allegation of it repugnant to the Matter shewed by himself in his Bar to the Avowry; and a Demurrer is not a Confession of all Matters in Fact, but of all such Matters in Fact which are well and sufficiently pleaded; for this Cause Judgment was given for the Avowant.

1 Brownl. 124. Co Lit. 72. a. Hob. 56, 164, 199. Cr. Arg. 10. Hutt. Arg 57. 3 Co. 52. b. Doct. pla. 116.

And the Cause that it was not against the Statute of Usury was, That nothing was to be paid by *Thomas Woodhouse* the Grantor within a Year and a Quarter after the Grant made; for within the 17 of *July* 1579. and *Christmas* 1580. no Rent is appointed to be paid. And if the Grantor had paid the 100*l.* the 17th of *July* 1580. the Rent should cease without any Thing paying for the said 100*l.* So that the Court said, It was a plain Bargain, and Purchase conditional of such Rent, and no Usury. It was in the Election of the Grantor to have paid the said 100*l.* and to have frustrated the Rent, so that the Grantee (as the Nature of Usury is) was not assured of any Recompence for the Forbearance of his 100*l.* for a Year, and the said Rent of 20*l.* *per Annum* is but a Penalty to the Grantor, and Assurance to the Grantee for the Payment of the said 100*l.* But it was resolved by the whole Court, That if it had been agreed between the Grantor and the Grantee, that notwithstanding such Power of Redemption, that the 100*l.* should not be paid at the Day, and that the Clause of Redemption was inserted to make an Evasion out of the Statute, then it had been an usurious Bargain and Contract within the said Statute. For if in Truth the Contract be usurious against the Statute, no Colours or Shews of Words will serve, but the Party may shew it, and shall not be concluded or estopped by any Deed, or any other Matter whatsoever; for the Statute gives Averment in such Case.

1 Buls. 36, 37. Cr. Jac. 253, 509. Cr. El. 27, 28. 1 Jones 410. Hard. 418. 1 Sid. 28, 182. Co. Lit. 3. b. Postea 70. b.

And *Popham* Ch. Just. said, If *A.* comes to *B.* to borrow 100*l.* *B.* lends it him, if he will give him for the Loan of it

2 And. 15, 16. Postea 70. a.

for

for a Year 20 *l.* if the Son of *A.* be then alive, this is Uſury within the Statue; for if it ſhould be out of the Statute for the Incertainty of the Life, the Statute would be of little Effect: And by the ſame Reaſon that he may add one Life, he may add many; and ſo like a Mathematical Line, which is *diviſibilis in ſemper diviſibilia.*

Noy 191. Hard. 418. Cr. Jac. 209, 253, 508, 509. Cr. El. 643.

Paſch. 37 Eliz. *Rot.* 1915.

IN THE

COMMON PLEAS.

CLAYTON's *Caſe.*

BEtween *Reighnolds* Pl. and *Clayton* Defend. in an Action of Debt on a Bond of 60 *l.* the Caſe was, *Clayton* requeſted *Reighnolds* to lend him 30 *l.* and on Communication betwixt them, *Reighnolds* doth lend *Clayton* 30 *l.* 6 *Decemb.* 34 *Eliz.* until the ſecond Day of *June* next following, to pay him for the Principal and Loan of it 33 *l.* at the ſaid ſecond Day of *June*, if the Son of the Obligee be then alive, and if he die before the ſaid Day, that then he ſhall pay him but 27 *l.* which was 3 *l.* leſs than the Principal. And it was reſolved by the whole Court, That it was an uſurious Contract within the Statute, according to the Opinion of *Popham* Ch. Juſtice before, and for the Reaſons there given by him, *Uſura dicitur ab uſu, & ære, quaſi uſuæra, i. e. uſus eris; Et Uſura eſt commodum certum, quod propter uſum*

Co. Ent. 168. pl. 42. 2 And. 15, 16. Moor 397.

1 Bulſtr. 36, 37. Palm. 547. Moor 397. 2 And. 15, 16. Cr. Jac. 209, 252, 253, 508, 509. Co. Lit. 3. b. Antea 69. b. 1 Sid. 28, 182. 3 Inſt. 151.

usum rei mutuatæ recipitur. And this Description agrees with this Judgment: For if on the first Contract he who lends reserves no certain Sum for the Loan; but *secundario speret de aliqua retributione ad voluntatem ejus qui mutuatus est, hoc non est vitiosum. Vide Granvile lib.* 7. *cap.* 16. & *lib.* 10. *cap.* 1. what was the old Law of this Land concerning Usury. *Vide etiam Leges Sancti Edwardi, &c.*

Pasch. 34 Eliz.

In the King's Bench, Rot. 275. *in Debt.*

HOE's *Case.*

(a) Cr. El. 579, 580. Goldsb. 166, 167, &c. Moor 469.

IN an Action of Debt brought by *(a) Hoe* in the King's Bench, *Phelix Marshal* was bail for the Defendant; and afterwards before any Judgment, the Plaintiff released to *Phelix* all Actions, Duties, and Demands; and afterwards Judgment was given against the Defendant, and on Default of the Def. a *Scire facias* issued against *Phelix Marshal*, who pleaded the said general Release; upon which the Plaintiff demurr'd. And it was adjudged that this *(b)* Release should not bar the Plaintiff; for the Words of the Bail are conditionally, that is to say, *Si contingeret prædict' defendentem debitum & damnum ill' præfat' quer' minime solvere, aut se prisonæ Mareschall' ea occasione non reddere, &c.* so that there can be by the said Bail no certain Duty till Judgment be given, for before that none can know to what Sum the Debt and Damages will amount: so he who is bail for the Def. is not bound in any certain Sum at first: But his Recognisance being general, shall be reduced to a Certainty by the Judgment, and not before; And therefore there is a *(c)* Difference between a certain Duty or Condition subsequent, for that may be released before the Day of

(b) 2 Bulst. 231, 286. Poph. 136. Goldsb. 168. Moor 469. Winch. 56. Cr. El. 580. Cr. Jac. 171, 401, 451, 623. 10 Co. 48. a. 51 a. Hutt. 12, 17. 1 Sid. 141. Co. Lit. 265. b.

(c) 1 Rol. Rep. 256, 311, 386. 1 Co. 111. b. Co. Lit. 274. b.

of a Performance of the Condition, and a Duty uncertain at firſt, and on Condition precedent to be made certain after; that in the mean Time is but a meer Poſſibility, and therefore cannot be releaſed, for this Recogniſance doth not create a Duty preſently, but ſhall produce a Duty after on a *Contingat*.

Note, That it was adjudged, *Trin.* 4 *Eliz. Rot.* 1207. in the Common Pleas, That by a Releaſe of all Actions, Suits, and Quarrels, a (*a*) Covenant before the Breach of it is not releaſed, becauſe there is not any Cauſe of Action, nor any certain Duty before the Breach of it, but the Breach of it ought to precede the Action, and the Cauſe of the Duty, and for this Cauſe ſuch Releaſe was no Bar. *Vide Dyer* 5 *Eliz.* (*b*) 217. *acc.* And *vide Littleton* in his Chapter of (*c*) Warranty 170. That by a Releaſe of all Demands a Warranty (which is a Covenant real) as is there ſaid, is extinct, yet it is executory and incertain; But there the Feoffee to whom the Warranty is made may preſently have a *Warrantia Chartæ*, and bind the Land *pro loco & tempore*. But ſee 35 *H.* 8. *Dyer* 57. that by a Releaſe of (*d*) Covenants, the Covenant is diſcharged before the Breach of it, which is proved by *Littleton* alſo, *fol.* 170. &c. 16 *E.* 3. *Barr.* 245. A Woman had Title of Dower, and releaſes to him in the Reverſion, and afterwards Tenant for Life ſurrenderd to him, and it ſeemed a good Bar; and yet the Woman had no Cauſe of Action againſt him in the Reverſion at the Time of the Releaſe made. But the Reaſon is becauſe the Woman had Right to the Land, and he in the Reverſion had an Eſtate on which a Releaſe might enure, and by Recovery of her Dower his Eſtate would be charged, 21 *H.* 7. the laſt Caſe. A Releaſe in Time of (*f*) Vacation to the Patron, diſcharges an Annuity with which the Parſon is charged in Reſpect of the Parſonage. *Vide* 40 *E.* 3. 22. 18 *E.* 3. *Avowry* 77. 13. *R.* 2. *Avowry* 89. 14 *H.* 4. 4. *Recordare longe.*

(*a*) 1 Co. 112. b. 8 Co. 153. b. 10 Co. 51. b. Co. Lit. 291. b. 292. b. Cr. Jac. 170. Moor 34. 2 Bulſt. 231. Yelv. 156. Hutt. 17. And. 8. Goldsb. 166, 167.

(*b*) 8 Co. 151. b. 153. b. 4 & 5 Eliz. Dy. 217. pl. 2. N. Bendl. 126. pl. 190. 1 And. 8. Co. Ent. 115. pl. 5. Goldsb. 160, 167. Hutt. 12. Cr. Jac. 487. Yelv. 156.

(*c*) 1 Co. 112. b. 8 Co. 154. a. Lit. ſect. 748. Lit. 171. a. Co. Lit. 392. b. Cr. Jac. 170.

(*d*) Poph. 136. Hutt. 17. 1 Co. 112. b. 10 Co. 51. b. 154. a. Co. Lit. and Chapter 11. 57.

Palm. 218. Yelv. 156. 2 Rol. 404. (*e*) 1 Co. 112. b. 8 Co. 151. a. b. 155. a. Doctrin. placit. 149. (*f*) 21 H. 7. 41. a. Br. Releaſe 33. Br. Dean 3 Co. 112. b. Poſtea 81. b. 2 Rol. 340. Co. Lit. 266. a. Fitz. Releaſe

Trin.

Trin. 34 Eliz.

In the King's Bench.

SEINT JOHN's *Case.*

Cr. El. 821, 822.

Gardener had a Judgment in the King's Bench againſt one *Seint John* of the County of *Bedford*, and had a *Capias ad ſatisfaciend'* againſt him, and got a Warrant from the Sheriff to a ſpecial Baily to arreſt him, who came near the ſaid *Seint John*'s Houſe to arreſt him, and becauſe he feared Reſiſtance he brought with him a Dagge. And *Seint John* being then a Juſtice of Peace of the ſaid County of *Bedford*, having Notice of it, ſent one of his Servants for him, who finding him armed with a Dagge, arreſted him, and brought him before the ſaid *Seint John* being the next Juſtice of Peace; who on Examination of the Matter committed him to the next Gaol, there to remain till he had paid 10*l.* one Moiety to the Queen, and the other Moiety to the Informer, according to the Statute of 33 *H.* 8. *cap.* 6. which prohibits *the Shooting in, or carrying*, &c. *of any Hand-gun.* And it was objected, that a Dagge was not within this Word *Hand-gun*, for it was ſaid, That Dagges were not in Uſe at the Time of the Making of the ſaid Act, but invented after; and although they are uſed with the Hand, yet it is not known by the Name of *Hand-gun*, no more than *Hagbut*, or *Demyhake*, which were alſo uſed with the Hand, but notwithſtanding are known by particular Names, and are not comprehended within this Word *Hand-gun*: For they are both particularly named with the Hand-gun in the Stat. So a Dagge is diſtinguiſhed by ſpecial Name from a Hand-gun. Wherefore for both theſe Reaſons, 1. That it was not in Uſe at the Time of the Making of the Act; 2. That it was known by a ſpecial Name, It was objected, that this Carrying of the ſaid Dagge was not within the ſaid Act. But it was reſolved by the whole Court, that it was within the ſaid Stat-

and comprehended within this Word *(Hand-gun)* for altho' no Gun was known by the Name of a Dagge at the Time of the Making of the ſaid Act, and altho' in common Speech a Dagge is known by a ſpecial Name, yet foraſmuch as he who made the Dagge, had his Invention from the Hand-gun, and it is not of any new Kind in Subſtance, but has only a little Alteration in Form and Quality, for this Cauſe it is comprehended within this Word (*Hand-gun,*) for if a little Alteration or Addition ſhould defeat the Penalty of the Act, the Statute would be of ſmall Effect. And it has been explained by ſundry Proclamations, That Piſtols, Dagges, *&c.* were within the ſaid Act: And it was ſaid, That where the ſaid Act doth prohibit Croſs-bows, thereby Stone-bows are alſo prohibited, *cauſa qua ſupra.* And the Preamble of the ſaid Act ſpeaks of a little Handgun. But it was reſolved for another Cauſe, That the Carrying of this Dagge was not prohibited by the ſaid Act, for the Sheriff, or any of his Miniſters, for the better Execution of Juſtice, may carry with them Hand-guns, or other Weapons invaſive or defenſive, and the ſame is not reſtrained by the general Prohibition of the ſaid Act. *Vide* 3. *H.* 7. 1. *a.*

Cr. El. 822. Hard. 484. 3 Inſt. 160. Cr. El. 822. Cr. El. 822.

Mich.

Mich. 34 & 35 Eliz.

In the King's Bench.

WILLIAMS's *Case.*

Salop.

Cr. El. 664.
1 Rol. 110.

THomas Williams Eſquire brought an Action on the Caſe in the King's Bench againſt *Henry Jones* Clark, and declared where the ſaid *Henry* being Vicar of *Alderbury in Comitat' prædict'*, ought and is bound by himſelf or by another Chaplain to celebrate Divine Service at *Wollaſton* in his Chapel of St. *John* within the Scite and Precinct of his Manor of *Wollaſton* aforeſaid, and within the Pariſh of *Alderbury* aforeſaid, there of antient Time built, every Sunday *per annum*, and every Feaſt-Day *per annum*, before Noon of the ſame Days, and to adminiſter the Sacraments to the ſaid *Thomas, hominibus, tenentibus & ſervientibus ſuis infra præcinctum ejuſdem manerii inhabitan' & commoran'. Idemq; Hen' Vicarius & omnes prædeceſſ. ſui Vicarii Eccleſiæ paroch' de Alderbury præd', a tempore cujus contrarii memoria homin' non exiſtit, per ſeipſum vel hujuſmodi Capellanum ad celebrand' divina ſervitia in forma prædicta in Capella præd', ac ſacrament' & ſacramentalia præfat' Thom' Williams & anteceſſor' ſuis, ac omnibus illis quorum ſtatum idem Thomas modo habet, ac hominibus ſervientibus, & tenentibus ſuis infra dictum ſcitum manerii præd' commorantibus, per totum annum miniſtrand' vel adminiſtratur' annuatim exhibere & ſuſtentare conſueverunt. Prædictus tamen Henricus Jones nunc Vicarius Eccleſiæ parochialis de Alderbury præd', per ſeipſum vel hujuſmodi Capellan' divinum ſervitium in Capella præd' in forma præd', ac ad Sacramenta & ſacramentalia eidem Thom' ac hominibus, ſervient' & tenent' ſuis ibidem in forma præd' miniſtrand', licet ſæpius requiſit', per magnum tempus, videlicet, a feſto Penteceſt' ultim' præterit' ante exhibition' hujuſmodi billæ, uſque exhibition' hujuſmodi bill', exhibere & ſuſtentare recuſavit, unde dicit quod deterioratus eſt*, &c. And the Defendan

Def. pleaded, Not guilty, and was found Guilty: And after divers Motions in Arreſt of Judgment, and the Matter well debated at the Bench, at laſt it was reſolved by *Popham* Chief Juſtice, and the whole Court, that in this Caſe an Action on the Caſe (a) did not lie, but the Remedy which the Plaintiff has is to ſue in the Spiritual Court: But if the Chapel had been (b) private only for himſelf and his Servants and Family within the ſaid Manor, there a private Action on the Caſe on the Preſcription would be maintainable by the Lord of the Manor, &c. for in ſuch Caſe he himſelf only (and none of his Family) ſhould have the Action; and altho' the divine Service be ſpiritual, yet forasmuch as it doth by Preſcription belong to a private Perſon, and to be celebrated for his Eaſe within his Manor, which ſhall be intended to begin at firſt by Grant, therefore for the not Doingof this ſpiritual Service an Action on the Caſe lies, and Damages ſhall be recovered for them; and therewith agrees 22 *H.* 6. 46. in the Prior of (c) *Woburn*'s Caſe. But when the Chappel is not (d) private to him and his Family, but publick and common to all his Tenants of the ſame Manor, which may be many and of great Number; there no Action on the Caſe lies for the Lord, for then every of his Tenants might alſo have his Action on the Caſe as well as the Lord himſelf, and ſo infinite Actions for one Default, *Et* (e) *boni Judicis eſt, lites dirimere, &* (f) *expedit reipublicæ ut ſit finis litium propter communem omnium utilitatem*; and yet they ſhall not be without Remedy in ſuch Caſe, for (as it hath been ſaid) they may and ought to ſue for ſuch Default in the (g) ſpiritual Court, and there it ſhall be redreſſed, and herewith agrees *Lit. lib.* 2. *cap. Frankalmoigne* 30 *b. Vide* † 27 *H.* 8. 27. *a.* A Man ſhall not have an Action on the Caſe for a Nuſance done (h) in the Highway, for it is a common Nuſance, and then it is not reaſonable that a particular Perſon ſhould have the Action; for by the ſame Reaſon that one Perſon might have an Action for it, by the ſame Reaſon every one might have an Action, and then he would be puniſhed 100 Times for one and the ſame Cauſe. But if any (i) particular Perſon afterwards by the Nuſance done has more particular Damage than any other, there for that particular Injury, he ſhall have a particular Action on the Caſe: And for common Nuſances, which are equal to all the King's Liege-people, the common Law has appointed other Courts for the Correction and Reforming of them, *ſcil.* Tourns, Leets, &c. (k) 5 *E.* 4. 2. *b. acc. Vide* 2 *E.* 4. 9. *a.*

(a) 3 Keb. 428. 9 Co. 112. b. Cr. El. 664. 1 Rol. 110. 1 Sid. 34.
(b) 1 Rol. 110. Lit. Rep. 95.
(c) 22 H. 6. 46. b. 47. a. Fitz. Action ſur le Caſe 12. Br. Action ſur le Caſe 61. Br. Juriſdiction 43.
(d) 1 Rol. 110. Lit. Rep. 95. * 2 Sid. 174.
(e) 4 Co. 15. b. 5 Co. 31. a.
(f) 8 Co. 37. b. 98. b. 6 Co. 7. a. 9 Co. 79. b. Co. Lit. 103. a. 2 Inſt. 411. 11 Co. 69. a. 3 Bulſt. 98. Hard. 128. Godb. 242.
(g) Lit. Sect. 136. Co. Lit. 96. a. Br. Action ſur le Caſe 6. † 2 Rol. Rep. 26. Br. Action ſur le Caſe 6 Br. Chimin 1. Br. Nuſance 1. 9 Co. 112. b.
(h) Co. Lit. 56. b. 1 Rol. 88. Cr. El. 664. 2 Jones 157. Moor 180. 9 Co. 113. a. 1 Show. 243, 255. 3 Mod. 289. Salk. 12. Comb. 180.
(i) Co. Lit. 56. a. Cr. El. 664. Cr. Jac. 446, 478 491. Noy 120. Moor 180. 9 Co. 113 a. Poſtea 104. b. 2 Rol. Rep. 26. Br. Action 6.
(k) Cr. Car. 185. Br. Action ſur le Caſe 93. Br. Nuſance 29. 9 Co. 112. b.

Paſch. 35 Eliz.

In the King's Bench.

The Caſe of the Orphans of London.

2 Rol. 313.
2 Inſt. 660.
March 107.
4 Inſt. 249.

NOTE it was reſolved by the whole Court, That if any Orphan of *London*, who is by the Cuſtom of *London* under the Government of the Mayor and Aldermen of the ſaid City, ſues in the Eccleſiaſtical Court, or in the Court of Requeſts, *&c.* for any Goods, Monies, or Chattels due to them either by the Cuſtom of *London*, or by any Deviſe or Legacy in the Will of their Anceſtor, or to have an Account, that a Prohibition will lie, becauſe the Government of the Orphans of the City of *London* doth appertain to the Mayor and Aldermen of *London*, and they have Juriſdiction of them. And *Popham* Chief Juſtice ſaid, That if the Lord of a Manor has Probate of Wills within his Manor, if any ſuch Will be to be proved in the Eccleſiaſtical Court, a Prohibition lies, becauſe the Juriſdiction belongs to another, otherwiſe the Party may have double Trouble. And I have ſeen two Precedents of Prohibitions granted on the ſaid Cuſtom of the Orphans of *London*.

2 Rol. 313.
5 Co. 16 a.
Caudry's Caſe.

Mich

Mich. 35 & 36 Eliz.

In the King's Bench.

WYMARK'S *Case.*

ABEL *Dun* brought an *Ejectione firmæ* againſt *William Law*, and declared of a Leaſe made by *Richard Sleford*, 9 *Nov.* 34 *El.* of a Houſe, &c. in *Northluffenham* in the County of *Rutland*, for three Years: The Defendant pleaded, That *ante præd' tempus quo*, &c. the ſaid *Richard Sleford* was ſeiſed in Fee of the Tenements aforeſaid; and 9 *Maii* 32 *El.* by his Deed indented and inrolled within 6 Months according to the Statute, *Quod quidem ſcriptum indentat' hic in* (a) *cur' profert*, &c. bargained and ſold the ſaid Tenements to *Edward Wymark* Gent. in Fee, by which and by Force of the Statute he was ſeiſed, till by the ſaid *Sleford* diſſeiſed, who made the Leaſe in the Declaration mentioned, on whom the Defendant by the Commandment of *Edward Wymark* entered, &c. To which the Plaintiff replied and confeſſed the Bargain and Sale by the ſaid Deed inrolled to the ſaid *Wymark*, *Modo & forma prout*, &c. *Et idem Abel ulterius dicit, quod in eodem ſcripto indentato, proviſ. exiſtit modo & forma ſequentibus videlicet, quod ſi præd' Edwardus Wymark*, &c. do not pay 300 *l.* 2 *Nov.* 1592, to *Sleford*, that then the ſaid Bargain and Sale ſhall be void; and ſhewed the Breach of the Condition and Re-entry, and the Leaſe made to the Plaintiff, and the Ejectment *prout* in the Declaration, without that, that the ſaid *Sleford* diſſeiſed the ſaid *Edward Wymark*, &c. on which the Defendant did demur in Law. And ſhewed this Cauſe according to the Statute (b) becauſe the Plaintiff in his Replication did not ſhew forth the Deed indented, which comprehended the Condition. And after good Debate and Conſideration of the Matter in Law, it was adjudged for the Plaintiff. And in this Caſe two Points were reſolved by *Popham* Chief Juſtice, and the whole Court.

Co. Ent. 190. pl. 4. 1 Rol. 751.

(a) Lane 32.

(b) 10 Co. 94. a. b. Co. Lit. 72. a. 27 El. cap. 4.

1. When any Deed is ſhewed in Court, the Deed by Judgment of Law doth remain in Court *a*) all the Term in which it is ſhewed; but at the End of the Term, if the Deed be not denied, then the Law doth adjudge it to be in the Cuſtody of the Party to whom it belongs; for the whole Term in Law is but one (*b*) Day, and therefore it ſhall be intended to remain in Court all the Term in which it is ſhewed, but when the Term (*c*) is cloſed and ended, then there is no Officer in ſuch Caſe to whom the Cuſtody of it by the Law belongs, and therefore the Party who ſhewed it ſhall have the Keeping of it: For a Man's Evidences are as the Sinews of his Land. And where it appears by 38 *H.* 6. 2. *a. b.* that becauſe the Deed in another Term is in the Cuſtody of the Party, and not in Court, the Defendant ſhall not have (*d*) *Oyer* of it; and therewith agree 4 *H.* 7. 18. & 21 *H.* 7. 30. *b.* Alſo *vide Lit. fol.* 88. *b.* if the Tenant in Aſſiſe pleads a Feoffment by Deed-Poll of the Plaintiff, and ſhews it in Court, in this Caſe (*Litt.* (*e*) ſaith) that foraſmuch as the Deed is in Court, the Feoffee may ſhew to the Court, how that in the Deed there are ſeveral Conditions, &c. but that is to be intended, that he ſhall take Advantage of the Condition in the Deed, in the ſame Term that it was pleaded and ſhewed forth. And therewith agrees 24 *E.* 3. 73. *b.* that when a Deed is in Court one may take Advantage of it without having it in Hand, 38 *E.* 3. 8. *a.* & 40 *Aſſ. pl.* 34. *acc'.* and in 45 *E.* 3. Tit. *Feoffm.* & (*f*) *Faits.* In Aſſiſe againſt ſundry Tenants, ſome pleaded as to one Parcel the Deed of the Anceſtor of the Pl. to them with Warranty ſhewed forth in Court; and ſome other of the Ten'ts as to other Parcels pleaded in Bar by the ſame Deed without having it in Hand; and it was challenged, becauſe the Deed ought to be ſhewed the Court againſt one, the other could not have Advantage of the ſame Deed without ſhewing it, & *non allocatur.* Note when the Deed is by one ſhewed to the Court, it is not reſpective as to him, but all others ſhall take Advantage thereof, 21 *E.* 4. 49. *a.* in the Abbot of *Waltham's* Caſe. If (*g*) Letters Patents be inrolled in any Court of Record, one may plead them in the ſame Court without ſhewing them, notwithſtanding that they were not pleaded before: And Difference was taken between Letters Patent or other Matters of Record, which of their own Nature are of Record, and Matter in Fact; for although a Deed be inrolled in Court, (*h*) one cannot plead it in the ſame Court without ſhewing it. *Vide* 19 *H.* 6. 6. *b.* 19 *E.* 4. 9. *b.* 22 *E.* 8. *Record Br.* 65. But if a Deed be pleaded and ſhewed in Court, (*i*) and denied, then it ſhall remain in Court ſtill ever, for if it ſhall be found not his Deed, it ſhall be (*k*) damned. 41 *Aſſ.* 29. 12 (*l*) *H.* 4. 8. *a. b.* 7 *H.* 4 (*m*) 39. *b.* 11 *H.* (*n*) 73. *b.* 45 *E.* 3. 11. *a.* And if a Deed be denied in one Court, [illegible] which

(*a*) Co. Lit. 231. b. 8 Co. 156. b, 157. a. Poſtea 76. b.

(*b*) 4 Co. 71. a. Godb. 433.

(*c*) Co. Lit. 231. b 1 Co. 1. b. 9 Co. 17. b. 11 Co. 50. b.

(*d*) Dyer pl 271 Goldsb. 150. Br. Laches 17. Br. Oyer de Records, &c. 16. Br. Contin. 74. Fitz. monſtrans de faits, &c. 98.

(*f*) Fitz. Feoffments & faits 55.

(*g*) Br. monſtr. de faits, &c. 124 Br. Plead. 110. in fine. Palm. 87.

(*h*) Br. monſt. de faits 123.

(*i*) Co. Lit. 231. b Salk. 215.

(*k*) 6 Co. 45. b.

(*l*) Fitz. monſt. de faits 129. Br. monſtr. de faits 38. Br. faits 20.

(*m*) 6 Co. 45. b. Br. faits 16.

(*n*) 6 Co. 45. b. Br. faits 19. Br. Obligat. 22.

(*o*) 6 Co. 45. b.

which it remains there, this Deed may be (a) pleaded in another Court without ſhewing it, 12 (b) *H.* 4. 8. *a. b.* & 43 *E.* 3. 27. *a. acc'.* for (c) *lex non cogit ad impoſſibilia.* Note a good Caſe in 42 *E.* 3. 18. *a.* where the Caſe was, That a (d) Feme-ſole made a Leaſe for Life, the Leſſee committed Waſt, the Husband releaſed and delivered the Deed to a 3d Perſon to be delivered to the Def. on certain Conditions performed; the Defendant performed the Conditions, the Husband got the Releaſe, and detain'd it from the Leſſee, and he and his Wife brought an Action of Waſt; the Leſſee on this ſpecial Matter ſhall plead it without ſhewing of it forth. *Vide* 10 *E.* 3. 40. *a.* If Husband and Wife be impleaded in a real Action, where the Default of the Wife is the Default of both, if the Demandant takes the Wife of the Tenant from him, it ſhall not turn the Ten't to a Default. So in Dower, Detinue of Charters, &c. by the Demandant is a good Plea. 20 *H.* 7. 5. Tenant by Statute-Merchant, or Staple, &c. ſhall not ſhew the Deed, for he comes to the Poſſeſſion of the Land by Proceſs of (e) Law, againſt the Will of him who has the Deed, and has no Means to come to it; otherwiſe of a Leaſe for Life or Years, &c. Becauſe he comes in by the Leſſor, and might have taken a Covenant, or other Security for his peaceable Enjoying of the Land let to him. And in Caſe when the Deed is denied, (f) the Law which has appointed the Deed to remain in Court, has alſo appointed an Officer to have the Cuſtody of it, and that is the *Cuſtos* (g) *Brevium*, as appears in *F.N.B.* 243. *L.*

(a) Co. Lit. 231. b.
(b) Fitz. monſt. de faits 129. Br. monſt. de faits 38. Br. faits 29.
(c) Co. Lit. 92. a. 231. b. Hard. 387.
(d) Statham Waſt 5. Fitz. Brief 554. Fitz. monſtr. de faits 139.
(e) 10 Co. 94. b. Cr. Car. 209. 442. Cr. Jac. 209, 317. Co. Lit. 225. b.
(f) Co. Lit. 231. b.
(g) F. N. B. 243. L. Co. Lit. 231. b.

2. It was reſolved, That the Courſe of the King's Bench is, that although the Plaintiff after the Bar pleaded has Day to reply two or three Terms after, no Mention ſhall be made in the Roll of any Imparlance or Continuance, but when he replies, the Entry ſhall be *ut ſupra*; *Et præd' Abel dicit quod ipſe per aliqua per ipſum Williel' ſuperius placit' ab actione ſua præcludi non debet*, &c. But otherwiſe it is of a Bar there, for that contains the Imparlance or Continuance, and is in ſuch Form, *Et modo ad hunc diem*, ſcil. *diem Veneris*, &c. *iſto eodem termino, uſque quem diem præd' Willielmus habuit licentiam interloquend'*; but no ſuch Entry is made on any Replication, Rejoinder, &c. by which it ſhall be intended, when they are generally entered on Record, that they were made in the ſame Term, in which the Bar was pleaded; and by Conſequence the Pl. in the Caſe at Bar, may take Advantage of the Condition compriſed in the Deed ſhewed forth by the Defendant.

Mich. 35 & 36 Eliz.

In the Common Pleas.

CLIFTON'S *Case.*

Dy. 25, 214. 6 Co. 37. Fitz. Waſt. 62, 117, 146. Fitz Judgment 85, 134, 255. Fitz. Damage 7, 22, 42, 52, 92, 113, 114. 1 Inſt. 53, 54, 200. 247, 355. F. N. B. 59. 2 Inſt. 299. Reg. 23. Raſt. Entr. 689.

IN a Writ of Waſt between *Tho. Southcote*, Eſq; Pl. and *John Clifton* Defendant, the Form of the Writ was ſuch; *Si Thom' Southcote Arm' fecerit, &c. ſummon' Johannem Cliſton quod ſit, &c. quare cum, &c. idem Johannes de terris, domibus, boſcis & gardinis in Otterie, quæ tenuit ad vitam Margaretæ nuper uxor' ſuæ, in jure ipſius Margaret' de præfat' Tho. ex dimiſſione quam idem Thomas inde fecit præfat' Margaret', & cuidam Petro Carew Militi quond' viro ſuo, ad vitam eorundem Petri & Margaret', fecit vaſtum, venditionem & deſtructionem, ad exhæreditationem ipſius Thom', & contra formam proviſion' prædict', ut dicitur, &c. & habeas, &c. Teſte 8 Februar' anno* 35.

And it was reſolved by the whole Court in the Common Pleas, that the ſaid Writ doth not lie; for the Recital of the Writ is, *Quare cum de communi conſilio Regni noſtri Angl' proviſum ſit, quod non liceat alicui vaſtum, venditionem, ſeu deſtructionem facere de terris, &c. ſibi demiſſis ad terminum vitæ vel annorum &c.* And in this Caſe the Husband had not any Eſtate for Life in this Land, but the Wife had the Eſtate for Life, and the Husband had it only in her Right, and ſo he is not within the ſaid Act; and therefore if a Woman Tenant for Life takes Husband who commits Waſt, and the Wife dies, the Husband ſhall not be puniſhed for this Waſt.

(a) 1 Rol. 351. 2 Rol. 827, 833, 834. Cr. El. 357. 2 Inſt. 301. Co. Lit. 54. a. Co. Ent. 703. pl. 9. 707. b.

Note, Reader, this Judgment given on Conſideration of the Stat. of *Glouceſter cap.* 5. and of the Opinions *obiter* in 10 *H.* 6. 11. & 12. by *Strange* and *Coteſmore*, 46 *E.* 3. 25. 46 *E.* 3. Waſte in *Statham.*

Paſch.

Paſch. 43 Eliz.

In the King's Bench.

PILKINGTON'S *Caſe.*

BEtween *Pilkington* (*a*) Plaintiff, and *Haſtings* and others Defendants in Replevin, it was reſolved by the whole Court, That when a Diſtreſs is taken for Damage-feaſant, that the Party may tender Amends till the Cattle are (*b*) impounded, but after they are in the Cuſtody of the Law, then the Tender comes too late. *Vide* 13 (*c*) *H.* 4. 17. & 27 *E.* 3. 88. And ſo it was adjudged *Trin.* 33 *Eliz.* between *Nevil* and *Segrave.*

2. It was reſolved, That Tender of Amends to the Bailiff (*e*) is not good, for he cannot deliver the Diſtreſs once taken, no more than he can change the Avowry of his Maſter, or demand Rent on a Condition of Re-entry.

(*a*) Co. Ent. 602. pl. 17. Cr. El. 813.
(*b*) Cr. El. 332, 813. 8 Co. 147. b. Hetl. 16. 1 Brownl. 173. 2 Inſt. 107. Lit. Rep. 34.
(*c*) Cr. El. 813.
(*d*) Cr. El. 332, 813. 1 Rol. Rep. 258.
(*e*) Cr. El. 813 Cr. Jac. 377. 1 Rol. Rep. 258. 2 Rol. Rep. 172. Hob. 154. 1 Brownl. 173.

Mich. 35 & 36 Eliz.

In the King's Bench.

The Earl of PEMBROOK'S *Caſe.*

IN an Action on the Caſe brought by the Earl of *Pembrook* againſt Sir *Henry Barkley*, for interrupting him of certain Walks in the Foreſt of *Selwood*; the Def. pleaded a Grant of them by the ſaid Earl to the Ld. *Maur. Berkley* in Tail by Deed ſhewn forth. It was held by *Popham* Ch.

Cr. El. 384, 486, 560. 2 And. 20. Goldsb. 130. Poph. 116. Hardr. 49. Moor 706.

Antea 74. b. Doct. pl. 118.

Juſtice, and the whole Court, That in the ſame Term the Plaintiff may pray that the Deed be entered *in hæc verba*, and afterwards he may demur, or take Iſſue at his Pleaſure, but in another Term the Deed ſhall not at his Prayer be entered *in hæc verba*, although he would demur on it, for then the Deed is out of Court: And afterwards the Deed on the Prayer in the ſame Term was entered *in hæc verba*, the Earl pleaded, that *ulterius per ſcript' prædictum proviſum fuit*, (without ſhewing forth any Part) becauſe the Deed was entered *in hæc verba*, *quod nota*, good Policy. And the Earl ſhewed the Condition and the Breach of it: *Nota bene.*

Mich. 35 & 36 Eliz.

In the Common Pleas.

PAGET's *Case.*

(a) 2 Co. 92. b. Cr. Jac. 688. 10 Co. 44. b. 11 Co. 81. b. Allein 82. 1 Jones 51. F.N.B. 58. c. 59. h. 50 E. 3. 4. a. 1 Rol. 377. 2 Rol. 119, 829. 2 Inſt. 301. Lit. Rep. 256. Winch. 79. Moor 18. Co. Lit. 54. a. 299. b. Vide Herla-kynden's Caſe in the 4th Part of my Reports acc' Lewis Bowl's Caſe, 11 Co. 81. b. (b) 4 Co. 62, 63. (c) 4 Co. 62. b. 11 Co. 48. b. 81. b. Cr. Car. 242, 243, 274. 2 Rol. 119. OBenl. 113, Palm. 327. Moor 19. 3 Rol. Rep. 181. 10 H. 7. 2. b.

BEtween *William Paget* Eſq; Plaintiff, and *Edward Cary* and *Elizabeth* his Wife Defendants in Waſt, in the Common Pleas, it was reſolved, that if there be *(a)* Tenant for Life, the Remainder for Life, the Remainder in Fee, if Tenant for Life doth Waſt in Trees, and afterwards he in the Remainder for Life dies, the Action of Waſt is maintainable for Waſt done in the Life of him in the Remainder for Life, for it was to the Diſinheritance of him in the Remainder in Fee; and now the Impediment, which was the mean Eſtate for Life is taken away. *Et remoto impedimento emergit actio.* And as it was there ſaid, ſo it was adjudged in 9 *Eliz.* The ſame Law, if he in the Remainder for Life after the Waſt ſurrender his Eſtate to him in the Remainder or Reverſion in Fee. And where it was objected, That at the Time of the Waſt, it could not be to the Damage of him in the Remainder in Fee, in Reſpect of the mean Eſtate for Life: To that it was anſwered and reſolved, when the Tree is ſevered, the *(c)* Property thereof belongs to him in the Remainder in Fee; and ſo where it is ſaid in ſome Books that he in the Remainder or

or Reverſion in Fee ſhall not have an (a) Action of Waſt, it is to be intended during the Continuance of the mean Remainder; And where in other Books it is ſaid, That in ſuch Caſe the Action of Waſt well lies, it is to be intended after the Death of him in the Remainder for Life. *Quia cum aliquid impeditur propter unum, eo remoto, tollitur impedimentum:* And ſo all your Books are well reconciled. *Vide* 11 *E.* 3. *Receit* 118. 4 *E.* 3. 18. *b. Cotte's Caſe*, 33 *E.* 3. *Waſt* (*b*) 114. 5 *E.* 3. 3. 10 *E.* 4. 9. *a. F. N. B.* (*c*) 58, 59. and the Writ in the *Regiſter*, 74. *b.* and the *Nota* there, *fol.* 75.

(*a*) 1 Rol. 377.

(*b*) 33 E. 3. Fitz. Waſt 144.

(*c*) F. N. B. 58. c. 59. b.

Trin. 36 Eliz. *Rot.* 1546.

In the Common Pleas.

BOOTH's *Caſe*.

GEorge Booth brought an Action of Waſt againſt *Skevington*, and declared that Sir *William Booth* demiſed for Years to *Enſor*, who aſſigned it to *Skevington*. The Defendant pleaded an Aſſignment to *Elizabeth Cave*, before which Aſſignment no Waſt done; The Plaintiff in his Replication ſhewed the Statute of 11 *H.* 6. *cap.* 5. and that the Grant to *Elizabeth Cave* was to the Intent, that he might not know againſt whom to bring his Action of Waſte; and averred that he took the Profits; The Defendant rejoined, that *Elizabeth Cave* granted her Eſtate to *A.* who demiſed to the Defendant at Will, without that, that he granted to the Intent, *&c.* on which the Plaintiff demurr'd in Law. And in this Caſe three Points were reſolved.

Co. Ent. 697. pl. 5. 2 Anderſ. 23, 24, &c. Co. Lit. 54, a. 2 Inſt. 302. F. N. B. 59, a. Dyer 8.

1. That altho' the Words of the ſaid Act are, That where Ten't for Life or Years have leaſed or granted their Eſtate, to the Intent that thoſe in Rev'n, *ſcil.* their Leſſors, their Heirs or Aſſignees may not know their Names; and afterwards the firſt Ten'ts continually occupy thoſe Lands, *&c.* and commit Waſt, *&c.* it is ordained and eſtabliſhed, that he in the Reverſion

(a) 2 Rol. Rep. 246. F. N. B. 59. c. Co. Lit 54. a. 2 Inſt. 302. Lit. Rep. 106. (b) Co. Lit. 54. a. 2 Rol. Rep. 246. (c) Doctrin. placit. 354. Cawly 35. (d) Doctrin. placit. 346, 350. Br. Parner de Profits 18. Br. Traverſe per, &c. 180. Br. Peremptory 40. Fitz. Maintenance de Brief 38. (e) Fitz. Maintenance de Brief 33.

verſion in ſuch Caſe ſhall maintain a Writ of Waſt againſt the ſaid Tenants for Life or Years. And there is Proviſo for the firſt Tenants. Yet it was reſolved, that every Aſſignee of the firſt Leſſee mediate or immediate is within the ſaid Act: For the Statute was made to ſuppreſs Fraud and Deceit, and therefore ſhall be taken beneficially.

2. It was reſolved, that he in *(b)* Remainder is within the ſaid Act, as well as he in Reverſion, for in equal Miſchief, yet the Preamble and the Body of the Act ſpeak only of him in Reverſion.

3. It was reſolved, that *(c)* the Intent aforeſaid was not traverſable in this Caſe but the Pernancy of the Profits, for that was a Thing notorious, whereof the Country might have Knowledge, and in the Pernancy of the Profits, the Intent is implied. *Vide* 4 *H.* 7. 9. *a.* in *Formedon*, the Tenant pleaded Nontenure, the Demandant ſaid, that he made a Feoffment to Perſons unknown to defraud him of his Tenancy, and took the Profits: The Pernancy of the Profits, *(d)* and not the Feoffment is traverſable. 4 *E.* 4. 29. *a.* *Q.* if it ſhould not be 4 *E.* 4. 22. *a.*

Trin. 36 Eliz. *Rot.* 877.

In the King's Bench.

SAMON's *Case.*

1 Rol. 243. Co. Ent. 3. pl. 4. Cr. El. 432. Moor 359. Lit. Rep. 30.

SAmon brought an Action on the Caſe on *Aſſumpſit*, and declared, that whereas Controverſies were between the Plaintiff and Defendant concerning divers Lands in *D.* The Defendant in Conſideration of 6 *d.* aſſumed and promiſed to pay 200*l.* to the Plaintiff, if the Defendant did not perform the Award of *J. S.* &c. which *J. S.* made an Award, That the Def. ſhould enter into a Bond to the Pl. that the Pl. and *Elizabeth* his Wife ſhould enjoy the ſaid Land, *&c.* which he had not done; on which the Def. demurr'd. And it was adjudg'd againſt the Pl. and the Reaſon and Cauſe of the Judgment was, becauſe the Award was void for the Incertainty;

certainty; (*a*) for it doth not appear of what Sum the Bond should be, for the Arbitrators are Judges of the Case; and their Judgment and Award ought to be certain, so that thereby the Controversy be decided; and that it should not for the Incertainty be a Cause of new Controversy. And the Arbitrators cannot (*b*) assign their Power over, but they themselves ought to determine it, and therefore neither the Plaintiff nor the Defendant can assess the Sum. But it was agreed that if *I.* covenants with *B.* to enter into a Bond to him for the enjoying of such Land, and does not express what Sum, he shall be bound in such Sum, as amounts to the (*c*) Value of the Land, as it is agreed in 10 *E.* 3. 18. If a Man grants an Annuity to one of 10 Marks till he be promoted to a convenient Benefice, the Law will expound it to be of the Value of the (*d*) Annuity or more; but the Reason of that is, because it is the Act of the Covenantor himself which cannot be void, but it is otherwise in the Case at Bar. Also the Award Was void as to the Wife, for she was (*e*) a Stranger to the Submission,

(*a*) Cr. Eliz. 432. Moor 359. Hardr. 45, 46. Style 56. 1 Rol. 263. Jenk. Cent. 340. March Arbitrament 163, 164, 192. 2 Rol. Rep. 214. Palm. 84, 146. Yelv. 98. Cr. Jac. 314, 315.

(*b*) Cr. El. 432.

(*c*) Cr. El. 432.

(*d*) Cr. El. 432.

(*e*) 1 Rol. 243, 247, 259. Cr. 3 Leonard 62. Godb. 12, 13.

El. 4, 432. Moor 3, 359. Cr. Car. 226. 1 Rol. Rep. 270. Kelw. 43. a. 2 Sand. 293, 337. Hutt. 9. Hardr. 46. Yelv. 98. Hetley 5. Styl. 39. 10 Co. 131. b.

Hill.

Hill. 37 Eliz *Rot.* 601.

In the King's Bench.

GRAY's *Case.*

Co. Ent. 573. pl. 4. Cr. El. 405, 546. Cr. Car. 533. Cart. 88. 1 Rol. Rep. 121, 123. Lit. Rep. 295. 3 Sand. 320.

IN *Replevin* between *Gray* and *Fletcher*, in Bar of the Avowry for Damage-feasance, the Plaintiff by Custom entitled himself to have Common of Pasture in the Place where, &c. to his Copyhold, which Custom was traversed. And it was found that he ought to have the same Common, but that every Copyholder had used to pay Time out of Mind, &c. *Pro eadem communia unam gallinam, & quinque ova annuatim.* And it was adjudged, that on this Verdict the Plaintiff should have Judgment; for the Plaintiff need not shew more then makes for him, and that is of his Part. And the Doubt was, what Remedy the Terre-tenant should have for the Hens and Eggs; for if the Terre-tenant has no Remedy for them, then the Commoner should have his Common *sub modo, scil.* paying so much, &c. and then it would be against the Pl. But if the Terre-tenant has a good Remedy for the Hens and Eggs, then as the Verdict is found, it is not *modus communiæ, scil.* a Manner of Commoning, nor Parcel of the Issue as to the Common, but a collateral Recompence to be paid for the Common, whereof every one has equal Remedy. And *Popham* Chief Justice said, that it was adjudged in a *Devonshire* Case, That where a Man prescribed to have Pot-water out of the River, &c. and the Jury found that he ought to have it paying 6*d.* Yearly. And it was adjudged that he had failed of his Prescription, for he had prescribed absolutely, and the Jury had found it conditionally, or *sub modo.* And then if he did not pay the Money he ought not to take the Water, and the Terre-tenant in such Case might disturb him, which is all the Remedy that the Terre-tenant had. But in the Case at Bar, the Terre-tenant may distrain

Cr. El. 405, 563. Dost. pla. 103. Hob. 42.

Cr. El. 405. Hob. 42. Dost. pla. 103. Godb. 238. Winch. 22.

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the Cattle of the Commoner on his own Land for the Hens and Eggs; and therewith agrees 26 *H.* 8. 5. But in the Case at Bar, if the Jury had found, that the Plaintiff should have Common paying so many Hens and Eggs, the Issue had been found against him, because it is Parcel of the Custom: But in the Case at Bar, the Custom as to the Commoning is perfect without the said Payment, and the Payment doth not limit or qualify the Custom, but it is a Recompence for the Common, for which Recompence the Terre-tenant has Remedy. But if the Terre-tenant had no Remedy for the Recompence, as in the Case put by the Chief Justice, but only to make the said Disturbance, as is aforesaid, then the said Manner of Payment (although it be found as it is in the Case at Bar) is Parcel of the Custom. Note a good Difference. And the like Judgment was given in the Common Pleas, *Pasch.* 37 *Eliz. Rot.* 723. between *Lovelace* and *Reighnold's*, *quod vide* there. *Vide* 10 *E.* 4. 17. *F. N. B.* 107. *a.* 15 *E.* 3. *Assise* 111.

Cr. El. 546.

Cr. El. 546, 563.

2 And. 67, 68.

Pasch.

Paſch. 37 Eliz.

In the King's Bench.

FITZHERBERT's *Caſe.*

Co. Lit. 366. b. 367. a. Cr. Car. 483, 484. 1 Jones 397, 398, &c. 3 Co. 78. a. Moor 469.

THE Caſe in Effect was; Tenant for Life, the Remainder to his Son and Heir apparent in Tail by Covin and Agreement between him and *A.* and *B.* to the Intent to bar his Son of his Remainder by a collateral Warranty made a Leaſe for Years to *A.* who made a Feoffment to *B.* in Fee, to whom the Father releaſed with Warranty, and all this by Covin and Conſent between the Parties, to the Intent aforeſaid; and afterwards the Father died, and the Warranty deſcended on the Son being then of full Age. And it was reſolved by *Popham* Chief Juſtice and the whole Court, that this Warranty ſhould not bar the Son; for the Feoffment of the Leſſee for Years is a Diſſeiſin, and the Father himſelf is *particeps criminis*, and agreeth to it, and then although the Releaſe with Warranty is made after the Diſſeiſin, yet for as much as the Diſſeiſin was to that Intent and Purpoſe, the Law will adjudge on the whole Act; as it is agreed in 19 *H.* 8. 12. *b.* If a Man diſſeiſes another to the Intent to make a Feoffm. with Warranty, although he makes the Feoffm. 20 Years after the Diſſeiſin, yet the Law will adjudge on the whole Act, and the Diſſeiſin and the Warranty ſhall be coupled together, according to the Intent of the Parties; and therefore in ſuch Caſe the Law will adjudge the Warranty to commence by Diſſeiſin, although they be made at ſeveral Times. As if a Man makes a Leaſe of Lands in two ſeveral Counties reſerving one intire Rent, although the Livery be made at ſeveral Times, firſt in one County, and then in the other, yet the Rent is iſſuing out of the Lands in both Counties; ſo if a Man makes a Charter of Feoffment with Warranty, and delivers the Deed, and afterwards makes Livery of the Land *ſecundum formam chartæ*, now the Law will judge on the whole Act, and although the Deed was delivered at one Time, and the Livery of the Land at another Time; and although a Warranty ought

Cr. Car. 483, 484. 3 Co. 78. a. Co. Lit. 367. a. 1 Jones 397, 398.

to

to enure on an Eſtate, yet on the whole Matter the Warranty is good.

2. It was reſolved, that although the Diſſeiſin was to the Father himſelf who made the Releaſe; yet foraſmuch as the Father agreed and conſented to the Diſſeiſin, and he who made the Warranty procured the Diſſeiſin, it ſhould not (a) hinder, but that the Warranty doth commence by Diſſeiſin, for *conſentientes & agentes pari pœna plectentur. Vide Litt.* 151. in his Chapter of *Remitter*. If the Husband diſcontinues (b) the Wife's Right, all is one as to a Remitter, if they procure or aſſent to a Diſſeiſin, and afterwards take a Feoffment of the Diſſeiſor, as if they themſelves had diſſeiſed the Diſcontinuee; and ſo are the Books in (c) 44 *E.* 3. 46. *a.* 18 *H.* 8. 13. 11 *E.* 4. 2. &c.

(a) Co. Lit. 466. b.

(b) Co. Lit. 357. a. Lit. ſect. 678. 3 Co. 78. a. Lit. 152. b.

(c) Perk. ſect. 394, 395. Plowd. 51. a. 3 Co. 78. a. Br. Faux fier de Recovery 6. Br. Colluſion 10. Br. Dower 15. Fitz. Dower 42.

3. Altho' the Diſſeiſin was not made immediately to the Son who is to be bound by the Warranty; yet foraſmuch as this Diſſeiſin was a Wrong to him, and did deveſt his Remainder out of him, it ſhould not hinder, but that the Warranty commences by Diſſeiſin. And ſo is the Book in 31 *E.* 3. *Warranty (d)* 28. where one Brother made a Gift in Tail to another, the Uncle diſſeiſed the Donee, and made a Feoffm. with Warranty; the Uncle died, and the Warranty deſcended on the Donor, and afterwards the Donee died without Iſſue; the Donor brought *Formedon* in the Reverter, and the Feoffee pleaded the Feoffm. with Warranty, the Demandant avoided it, becauſe it began by Diſſeiſin, and yet the Diſſeiſin was to the Donee and (e) not to the Donor, but by the Diſſeiſin a Wrong was done to him, and his Reverſion by it was deveſted. In this Caſe *Popham* Ch. Juſt. ſaid, That this very Point was in Queſtion between *Pawlet* and *Putenham*, and *Pawlet* who was in the Remainder enjoyed the Land. And by great Advice it was reſolved, that he was not barr'd by the Warranty: But it was not adjudged. *Vide* Reader the Books 14 *E.* 3. *Warranty* 5. *Temp. E.* 1. *Warranty* 86. 27 *E.* 3. 89. 12 *Aſſ. p.* 9. 4 *Ma. Dyer* 148, &c. and the Stat. of *Gloceſt. c.* 3. and the Stat. of 11 *H.* 7. *c.* 20. (f) That the Releaſe with Warranty of Ten't by the Curteſy, Ten't in Dower, or Ten't for Life to the Diſſeiſor was a collateral Warranty by the Com. Law, and ſhould bind the Heir: But that is to be intended when there was not any Covin or Colluſion to make Diſſeiſins. But after Diſſeiſins made without Covin there ſuch Releaſe in Caſe of Ten't by the Curteſy, or Husband ſeiſed in Right of his Wife before the Statute of *Gloceſter*; or of Tenant in Dower, or in Jointure, before the Statute of 11 *H.* 7. (g) was a Bar, as a Releaſe by another Tenant for Life is at this Day. But a Releaſe at this Day by Tenant for Life made to a Diſſeiſor, or any other without Covin; and yet to the Intent to bar him in the Reverſion, ſhall bar him; for Intent without Covin and

(d) Co. Lit. 366. b. 3 Co. 78. a.

(e) Co. Lit. 366. b. 367. a.

Br. Judgm. 151, 248. 1 Inſt. 326. b. 381.

(f) Co. Lit. 365. b.

(g) Co. Lit. 326. b. 365. b.

Diſſeiſin ſhall not avoid the Warranty. As if the Father in the Caſe at Bar had made a Feoffment in Fee with Warranty, and died, this Warranty ſhould bind the Son, altho' is was made of Purpoſe to bar him, for there was not any Diſſeiſin; and therefore ſuch Warranty cannot be avoided by Averment of Covin, becauſe there was not any Diſſeiſin in the Caſe, for a Warranty commencing by Wrong ſhall not be avoided, but a Warranty which commences by Diſſeiſin. And altho' it is ſaid in our Books (and it is true) That Warranties are much favoured in Law, becauſe they extend to eſtabliſh him who is Terre-tenant in Poſſeſſion; yet when they are mixt with Covin, which is ſo odious, and ſo much abhorred in Law, the Warranty loſes not only its Favour, but its Force alſo: For Covin is like Poiſon, which will infect all the good Things wherewith it is mixt.

Co. Lit. 366. a. 1 Co. 66. b.

Note Reader, a good Reſolution, for if ſuch covenous Invention ſhould be allowed in Law, every Father, or other Anceſtor, who on Conſideration of Marriage, or other good Conſideration has aſſured and eſtabliſhed his Lands after his Death to his Heir apparent, might by ſuch covenous and ſiniſter Device diſhinherit his Heir apparent, which would be full of great Inconvenience.

Paſch

Paſch. 37 Eliz.

In the Common Pleas.

FOORD's *Caſe.*

BEtween *Bettisford* and *(a) Foord* in Replevin, the Caſe was ſuch; The Prebendary of *Kingſton* in the County of *Dorſet* in the Cathedral Church of *Salisbury* in the Time of King *H.* 8. made a Leaſe of the ſaid Prebend for 70 Years. The Biſhop, Patron of the ſaid Prebendary, and the Dean and Chapter, by their ſeveral Inſtruments under their common Seal (reciting the ſaid Leaſe) confirm'd *dimiſſionem prædictam in forma prædict' fact' pro termino* 51 Years *tantum, & non ultra.* And afterwards the ſaid Prebendary made another Leaſe to begin after the Determination of the firſt Leaſe, *&c.* And whether the firſt Leaſe ſhould continue after the 51 Years, *viz.* Whether the Confirmation ſhould extend to the whole Term, or for the 51 Years only was the Queſtion. And it was adjudged, that the ſaid Confirmation (as this Caſe is) ſhould extend to the *(b)* whole Term; for when the Biſhop and the Dean and the Chapter (reciting the ſaid Demiſe for 70 Years) had confirmed *dimiſſionem prædict' in forma præd'*, theſe Words (*pro termino* 51 Years) *& non ultra*, come too late, and the Leaſe being for 70 Years, it is repugnant to confirm *dimiſſionem prædict'* for 51 Years, for it is as much as if they had confirmed the Leaſe and Term of 70 Years for 51 Years. But if the Biſhop and the Dean and Chapter had recited the Leaſe, and had confirmed the *(c)* Land to the Leſſee for 51 Years, that had been good enough, for then there would not be any ſuch Repugnancy in the Confirmation.

(a) 1 And. 47. Cr. El. 447. 472. Dy. 338, 339. pl. 43. N. Bendl 238. Latch. 251. Lane 64. Lit. Rep. 364.

(b) Co. Lit. 297. a. 1 And. 47. Cr. El. 447, 472. Lit. Rep. 82. Dy. 52. pl. 46. Winch. 95, 96.

(c) 1 And. 47. Cr. El. 447, 472. Lit. Rep. 82.

Et nota, A Difference *(d)* between a bare Aſſent, without any Right or Intereſt, and an Aſſent coupled with a Right or Intereſt; for the Ten't who is to perfect a Grant by his Attornment, cannot aſſent for a Time, nor *(e)* on Condition,

(d) Cr. El. 447. Co. Lit. 297. a. 1 Anderſ. 47.

(e) Co. Lit. 297. 274. b. 300. b. 2 Co. 68. a. 9 Co. 85. b. 1 Rol. 412. M. 1.

Condition, nor for Part of the Thing granted, but it shall absolutely enure to all, because he has but a bare Assent, which cannot be qualified, or apportioned: But the Bishop who is Patron, and the Dean and Chapter have an Interest in the Prebend, and every Part of it, for the Patron has *Jus conferendi*, and a Release to the Patron of an Annuity in the Time of (*a*) Vacat. is good, as it is held in 21 *H.* 7. 41. *a.* 8 *E.* 3. 28. *Persey's* Case. 33 *E.* 3. *Aid le Roy* 103. 8 *H.* 6. 24. *acc'*. Also it is held in 31 *E.* 3. *Graums* 90. 16 *E.* 3. *Annuity* 23. 8 *R.* 2. *Annuity* 53. That the Patron and Ordin. may (*b*) charge the Glebe in Time of Vacat. therefore they have an Interest; and *Fitz. N. B.* 49. saith, that the Right is in the Patron and Ordin. *Vide Lit. lib.* 3. *cap. Discontinuance* 144, 145. So if the Lease be made of 20 Acres, they may make a Confirmat. as to Part of the Land, as for one or more Acres: So they may confirm Part or all on (*c*) Condition; by which it appears that they have not a bare Assent, as in Case of Attornment, but an Assent clothed with an Interest.

Anoth. Difference was taken between a Lease for Years, and a Lease for Life, a Gift in Tail, or a Feoffm. in Fee; For if a Prebendary makes a Lease for Years, a Confirmat. may be made of the Land, as has been said before, for (*d*) less Years, for the Years are several, altho' the Lease or Term be one.

If I sell you any Thing for 100 *l.* to be paid 20 *l. per ann.* in 5 Years, I shall not have an Action of Debt (*e*) till all the Years be incurred, because all is but one Contract: But if a Man makes a Lease of Lands for 5 Years, rendering every Year 20 *l.* there in the Case of a Lease of Land for Years, the Years are several, and he shall have an Action of Debt for every Year, as it is adjudged in 45 *E.* 3. 8. But if a Prebendary makes a Lease for Life, or a Gift in Tail, or a Feoffm. in Fee, and a Confirmat. is made of the Land to the Lessee, Donee or Feoffee for one Hour, it is good for ever, for an Estate of Freehold or Inheritance is intire: And therefore if he who has a Freehold or Inheritance be disseised, and confirms the Land to the Disseisor for an Hour, it is good for ever.

So if a Disseisor makes a Lease for Life, or a Gift in Tail, and the Disseisee confirms the Land to the Lessee or Donee for an Hour, it shall confirm his whole Estate, but it shall not (*f*) enure to the Remainder or Reversion, because he confirms the Land to the Lessee or Donee only, and the Estate for Life or in Tail, and the Remainder or Reversion are several distinct Estates: But if the (*g*) Disseisor makes a Lease for Years of 20 Acres, the Disseisee may confirm the Whole, or any Part of the Land to the Lessee, to have and to hold to him for all, or any of the Years, upon or without a Con-

(*a*) Ant. 71. a. Br. Release 33. Br. Dean and Chapter 11. 1 Co. 112. b. 2 Rol. 340. Co. Lit. 266. a. Fitz. Release 57.

(*b*) 1 Co. 147. b. Co. Lit. 297. a. 341. b. F. N. B 152. J.

(*c*) 1 Rol. 412.

(*d*) Co. Lit. 297. a

(*e*) 3 Co. 22. a. 4 Co. 94. b. 8 Co. 153. a. 10 Co. 128. b. 1 Brownl. 62, 63. F. N. B. 130, 131. h. 131. a. 2 Leon. 107, 108, 131. 3 Leon. 4. 4 Leon. 13. Ow. 42. Benl. in Ash. pl. 10. O. Benl. 3. pl 8. N. Benl. 57. pl. 93. Benl. in Kelw. 208, 209. Yelv. 67. Cr. El. 118, 119, 776, 807. Moor 13. 1 Rol. 29. 601. 1 Ro. Rep. 221. 2 Rol. Rep. 47. Br. Action sur le Case 108. in fine. Cr. Car. 241. Cr. Jac. 505. Co. Lit. 47. b. 297. a. 252. b. 2 Sand. 337.

(*f*) Cr. El. 118, 119. 472. Lit. Sect. 521. Co. Lit. 47. b. 297. a. 3 Co. 22. a. 8 Co. 153. a. 10 Co. 128. b. 2 Brown. 62. 63. 2 Leon. 108. Owen 42. 1 Rol. Rep. 221.

(*g*) Co. Lit. 297. a.

a Condition; for although the Term or Demiſe be one, and therefore if the Term or Demiſe be confirmed for an (*a*) Hour, it is good for ever, as it is reſolved in the Caſe at Bar; yet the Years and Acres are ſeveral, and therefore the Confirmation may extend to Part of them: *Pari ratione*, if my Tenant (*b*) for Life makes a Leaſe for Years, I may confirm the Land to him for leſs Years: So if Tenant in Tail makes a Leaſe for 40 Years, and dies, the Iſſue in Tail may confirm the Term or Part, &c. for leſs Years. The ſame Law of a Woman after Coverture. *Vide Lit. lib.* 3, *cap. Confirmations* 119, 120, &c.

(*a*) Co. Lit. 297. a.

(*b*) Co. Lit. 297. a.

Cases of Customs.

Trin. 37 Eliz.

In the Common Pleas.

SNELLING'S *Case.*

(a) Noy 53. Cr. El. 409, 410. Hob. 86. Swinb. 328, 329.

BEtween (a) *Snelling* and *Norton* the Case was such; Debt was brought by *Snelling* against *Norton* Administrator of *N.* on a Bond; the Defendant shewed the Custom of *London*, That if a Contract be made by a Citizen in *London* to pay Money to another Citizen, and he who ought to pay dies intestate, that the Administrator shall be bound to pay it as well as if it was by Bond. And shewed further, that the Intestate was a Citizen of *London*, and was indebted on Contract to such a Citizen, who after the Death of the Intestate had recovered against him, on which the Pl. demurr'd in Law; and Judgment was given against the Pl. And in this Case three Points were resolved.

(b) 8 Co. 126. a. Cr. Car. 347. Hard. 303. (c) Hob. 86. Cr. El. 410. 1 Rol. Rep. 105. 1 Rol. 551, 555, 556. 557. (d) Cr. El. 410. 1 Rol. 551. Dy. 247. pl. 73. (e) 2 Inst. 398. Selden. Jurisdict. de Testament. 24. Co. Litt. 133. b. 9 Co. 38. b. (f) Cart. 118. Cr. El. 409.

1. That the said Custom (c) was good against the Opinion in *Dier* 8 *Eliz.* 247 (d), for although none was chargeable at the common Law by the Name of Administrator, because before the Statute of (e) 31 *E.* 3. no Action lay against an Administrator by such Name, and the Custom cannot begin after 31 *E.* 3. which is within Time of Memory; yet forasmuch as they were chargeable at the Com. Law, as Executors for their Administration, so that the (f) Name of the Charge is only changed, and yet in Substance is all one, for every Executor is an Administrator of Goods; and the Pleading is *ne unques executor ne unques admini-*

administravit as Executor; and an Administrator has the Office or Quality of an Executor, therefore the Custom alledged in such general Manner was resolved to be good.

2. It was resolved, if the Ordinary took the Goods into his Possession, he was chargeable by the Common Law. And the Statute of *Westm.* 2. *cap.* 19. *Cum post mortem alicujus*, was made in Affirmance of the Common Law. *Vide* 17 *E.* 2. *Brief* 822. 24 *E.* 3. 55. 11 *E.* 3. *Executors* 77. 18 *H.* 8. 23. 9 *E.* 4. 33. 11 *H.* 7. 12. *F. N. B.* 120. *D.*

Dyer 247. pl. 73. 2 Inst. 397. Plow. 277. a. b. 9 Co. 39. b.

Dyer 196 pl. 42. 1 Rol. 556.

3. It was resolved, although the Plaintiff was a Stranger and no Citizen, yet this Custom was good to bind him. *Vide* 1 *E.* 4. 6. *a.*

Hill. 38 Eliz.

The Case of Market-overt.

AT the Sessions of *Newgate* now last past, it was resolved by *Popham* Chief Justice of *England*, *Anderson* Chief Justice of the Common Pleas, Sir *Thomas Egerton* Master of the Rolls, the Attorney General, and the Court, That if Plate be stollen and sold openly in a Scrivener's Shop on the Market-Day, (as every Day is a *(a)* Market-Day in *London* except *(b)* Sunday) that this Sale should not change the Property, but the Party should have Restitution; for a *(c)* Scrivener's Shop is not a Market-overt for Plate; for none would search there for such a Thing, *& sic de similibus, &c.* But if the Sale had been openly in a *(d)* Goldsmith's Shop in *London*, so that any one that stood or passed by the Shop might see it, there it would change the Property. But if the Sale be in the Shop of a Goldsmith, either behind a Hanging, or behind a Cupboard upon which his Plate stands, so that one that stood or passed by the Shop could not see it, it would not change the Property: So if the Sale be not in the Shop, but in the Warehouse, or other *(e)* Place of the House, it would not change the *(f)* Property, for that is not in Market-overt, and none would search there for his Goods. So every Shop in *London* is a Market-overt for such Things only which by the Trade of the Owner are put there to Sale; and when I was Recorder of *London*, I certified the Custom of *London* accordingly. Note Reader, the Reason of this Case extends to all Markets-overt in *England*.

(a) 1 And. 344, 345. 2 And. 115. Moor 625, 360. Pop. 84. Cr. El. 454. 3 Co. 78. b. 8 Co. 127. a. 9 Co. 66. b. 2 Brownl. 288. Dy. 122. pl. 16. 35 H. 6. 29. b. 2 Inst. 713. 1 Jac. cap. 21.

(b) Hale's Pl. Cro. 45. Palm. 485. 2 Brownl. 288. 8 Co. 127. a. 9 Co. 66. b. Cr. Jac. 69, 280, 496. Jenk. Cent. 291. 1 Jones 156, 157. Cawly 78. Dy. 168. pl. 17. Pop. 84. Moor 624. 1 Anders. 344.

(c) Cr. Jac. 69. Poph. 84. 1 And. 344. Moor 360, 625. 625. Cr. El. 454. Poph. 84. Godb. 131. Palm. 485, 486. 1 Jones. 164. (f) 1 Jac. cap. 21.

(d) Moor. 360. Poph. 84.

(e) 1 And. 345. Moor 360,

Trin.

Trin. 41 Eliz.

In the Common Pleas.

PERRYMAN's *Case.*

IN Replevin between *Bowyer* and *Perryman*, the Defendant did avow for Damage-feasance in his Freehold; and Issue taken on the Freehold, and a special Verdict was found to this Effect; *R. R.* seised of the Land in Fee did enfeoff divers Persons by Deed in Fee, and died without Heir, and found a Custom in this Manner, *Infra maner' de Porchester, a tempore cujus contrarii, &c. habebatur consuetudo, Quod si aliquis tenens aliquorum terrarum sive tenementor' de manerio prædict' tent alienaverit sive concesserit hujusmodi terr' sive terram per script' sive feoffament' inde confect', vel per testament' suum hujusmodi terr' sive tenementa dederit sive legaverit, quod tunc hujusmodi alienatio, concessio, don', seu legatio fact', vel ad proxim' Cur' ejusdem manerii fuerunt præsentat' & præsentari consueverunt, vel ad aliquam Cur' ejusdam maner' infra annum post hujusmodi alienationem, conecssion', sive feoffament', donum, sive legationem fact', vel ad proxim' Cur' ejusd' manerii post annum illud tenend': Et si aliqua talis alienatio, concessio, &c. in forma præd' non præsentat' fuerit, tunc hujusmodi alienatio, conecssio, &c. sic minime præsentat' per consuetudinem manerii illius vacua fuerit:* And found that the said Land was held of the said Manor; and that the said Feoffment was not presented according to the Custom. And whether this was a reasonable or lawful Custom or not was the Question; and it was adjudged, that it was a (*a*) reasonable Custom: But against this Custom it was objected:

2 And. 125, 126 Cr. El. 668, 669

1. That if this Custom should be allowed, what Remedy (*b*) if the Tenants will not present it? Or if the Steward will reject the Presentment? As to that it was answered by the Court, That the like Objection might be made on a Bargain and Sale by Deed, what Remedy if the Clerk will not inrol it? And in Case of Copyhold, what Remedy if the Copyholders will not present a Surrender made out of Court? *Et caveat (c) emptor*, and he at his Peril is to perfect all that is requisite to his Assurance. And it is not like the Case in 2 *H.* 4. 24. *b.* where a Custom was pleaded, that none should use (*d*) his Common in such a Place till the Lord

(*a*) Lit. Rep. 233 2 And. 125. Lane 32. Bridg. 82, 83. Het. 127. Bridg. 51. 3 Bulst. 215.

(*b*) 2 Bulst. 337.

(*c*) 1 Rol. Rep. 125, 195. 4 Co. 26. a.

(*d*) Firz. Custom 10. Br. Custom 12

entered with his Cattle; and *per totam Curiam* that cannot be a Cuſtom, for if the Lord will not enter, it is not Reaſon that the Commoner ſhould loſe his Common.

2. It was objected, that once it was a Feoffment, then to ſay that the Cuſtom of the Manor ſhould deveſt an Eſtate of Freehold and Inheritance veſted by ſolemn Livery would be againſt Law. To which it was anſwered and reſolved, That the Reaſon of the common Law, that Land ſhould paſs by ſolemn (*a*) Livery, was to give Notice to the Country who were Owners of the Land, to the Intent that none might be deceived in Taking of Leaſes and Eſtates, and every one have Notice who ſhould be Tenant to the *Præcipe*; and Lords would have better Knowledge of their Tenants to have Wards, Eſcheats, *&c.* And therefore a Cuſtom which fortifies the Reaſon of the common Law with greater Solemnity and Notice, is good, as in this Caſe, to have the Feoffment openly preſented in open Court, to the Intent that the Lord and all his Tenants might take Notice; and therefore if it be not preſented according to Cuſtom, then the Livery is become void, becauſe it wants Preſentment, which is Part of the Eſſence of the Livery; and it was ſaid, that there is not *plenum & perfectum feoffamentum* in this Caſe, till Preſentment made in Court according to the Cuſtom; but *opus* (*b*) *inchoatum & non perfectum*; and yet if the Feoffor or Feoffee (*c*) dies, and afterwards it is preſented according to the Cuſtom, it is good. As if a Man delivers a Writing (*d*) as an Eſcrow, to be his Deed on certain Conditions to be performed, and afterwards the Obligor or Obligee dies, and afterwards the Condition is performed, the Deed is good, for there was *traditio inchoata* in the Life of the Parties, *ſed poſtea conſummata exiſtens* by the Performance of the Condition takes its Effect by Force of the firſt Delivery, without any new Delivery: So in the Caſe at Bar, when the Feoffment is preſented according to the Cuſtom, then it takes its Effect by Force of the Livery before: And it was ſaid, there was a Cuſtom in *Kent*, That if the free Tenants of a Caſtle did not pay their Rents, that they ſhould loſe their Land held of it. And that the Cuſtom of *Lidford* Caſtle in the County of *Devon* is, That a Freeholder of Inheritance cannot paſs his Freehold, unleſs by Surrender into the Hands of the Lord, *&c.* And the Cuſtom of *London* is, That a Deviſe of Land by Will in Writing being inrolled is good, for it has greater Solemnity added to the Will than in other Boroughs where Lands are deviſable: And ſo Judgment was given in the principal Caſe, that the Cuſtom was good and lawful. And this Plea began *Hill.* 40 *Eliz. Rot.* 159. in the Common Pleas.

(*a*) Plow. 302. b.

(*b*) Bridg. 82. 83.
(*c*) Lane 32. Bridgm. 51.
(*d*) 9 Co. 137. a. Co. Lit. 36 a. Cr El. 520, 835, 836, 884. 2 Rol. 26 27. Moor 642, 699. 697. Noy 6. 50. Cr. Jac. 85, 66. Style 251. Hob. 246.

Paſch

Paſch. 38 Eliz.

IN THE

KING's BENCH.

Sir HENRY KNIVET's *Caſe.*

BEtween Sir *Henry Knivet* Plaintiff, and *Pool* and others Defendants, on a ſpecial Verdict the Caſe was ſuch; Tenant for Life, the Remainder in Fee to the Plaintiff, Tenant for Life leaſed for Years, the Leſſee for Years is ouſted, and the Tenant for Life diſſeiſed; the Diſſeiſor made a Leaſe for Years, and his Leſſee ſowed the Land; and Tenant for Life died. Sir *Henry Knivet* who had the Remainder in Fee entred; the Defendants took the Emblements, and for them Sir *Henry Knivet* brought an Action of Treſpaſs; and on Not guilty pleaded, the Jury found the ſpecial Matter aforeſaid. And it was adjudged, that the Plaintiff being he in the Remainder, had no Right to the Emblements. It was alſo reſolved, That the Defendants claiming by the Leſſee of the Diſſeiſor had not the mere Right to them, but in Reſpect of his Poſſeſſion ſhould bar the Plaintiff; but the mere Right was in the Leſſee of the Tenant for Life, and he might have an Action of Treſpaſs, and ſhould recover all the mean Profits againſt the Leſſee of the Diſſeiſor; therefore he in the Reverſion ſhould not have Remedy for them alſo, nor recover Damages for them, for then the Leſſee of the Diſſeiſor would be twice charged: But as to the Entry into the Land to take the Emblements, it was good Matter of Juſtification; but foraſmuch as they had pleaded Not guilty, the Plaintiff had Judgment for the Entry, and was barred for Reſidue.

Goldsb. 143, 144. Cr. El. 463, 464. 2 Inſt. 81.

Hob. 132. Co. Lit. 55. b.

Co. Lit. 282. b. Doct. pla. 202.

And note Reader in the principal Caſe, The Leſſee of

of the Tenant for Life had Right to the Land, and by Conſequence to the Emblements, as Things annexed to the
Co. Lit. 55. a. b. Land, and the Death of the Leſſee for Life determined his Intereſt to the Land; but his Right to the Emblements remained, and that was the principal Reaſon of the Judgment.

Trin. 38 Eliz.

In the King's Bench.

PENRYN's *Case.*

Moor 403. Jenk. Cent. 141, 142, 259. 2 Rol. Rep. 29.

IN a Writ of Error between *William ap Richard*, and *William Penryn* on a Judgment given in *Wales* in the County of *Montgomery*, before Sir *Richard Shutleworth* Juſtice there, in a *Quod ei deforceat* in the Nature of a Writ of Right, (as the Uſe and Precedents are there) the Error was aſſigned in the Matter in Law, which was ſuch; *William ap Richard* brought a *Quod ei deforceat* in the Nature of a Writ of Right of certain Lands in the County of *Montgomery* againſt *Penryn*, who appeared and joined the Miſe on the mere Right, and thereupon a Jury by *Venire fac.* was returned, whereof 12 were ſworn and charged; and before Verdict the Demandant was Nonſuit, on which final Judgment was given; *ſcil. Quod tenens teneat terram illam ſibi & hæred', in pace verſus petentem & hæred' ſuos imperpetuum.*

Cr. El. 503. Co. Lit. 295. b. Lit. ſect. 51.

And afterwards the ſame Demandant brought another *Quod ei deforceat*, in the Nature of a Writ of Right againſt the ſame Tenant of the ſame Land, who pleaded the final Judgment in Bar: On which the Demandant did demur. And Judgment was given againſt him; and on this latter Judgment the Demandant brought a Writ of Error. And after many Arguments and long Deliberation the Judgment was affirmed. And in this Caſe three Points were reſolved.

Co. Lit. 295. b. Cr. El. 503.

1. That altho' by the Stat. of *Rutland*, made 12 *E.* it is provided, that Trial in *Wales* in a Writ of Right ſhall be by common Jurors, and by 12, yet Judgment final ſhall be there given, as it was before the Stat, altho' the Manner

and Dignity of the Trial was altered; for the Statute has altered the Trial, but the Judgment which belongs to such Action remains as it was before, Jenk. Cent, 259.

2. If Judgment final be given in a Writ of Right where it ought not to be, yet it shall bind till it be reversed.

3. It was resolved, That if Tenant after the Mise joined make Default, Judgment final on this Default shall not be given (as *Fitzherbert* in his *N. B. 6.* holds) but a *petit Cape* shall issue; for Peradventure he may save his Default. See *Temps E.* 1. *Droit* 41. 13 *E.* 1. *Droit* 51. 7 *E.* 3. 67. 8. *E.* 3. 8. 11 *E.* 3. *Statham, Droit*, 27 *E.* 3. 85. 33 *E.* 3. *Judgment* 252. 44 *E.* 3. 13 *H.* 4. *Judgment* 245, 3 *H.* 6. 55. 10 *H.* 6. 2. 9 *E.* 4. 16. 12 *H.* 7. 26 *H.* 8. 8. 35 *H.* 8. *Dy.* 56. 1 *Mar. Dyer* 98, 103. where Judgment final in a Writ of Right shall be given. Co. Lit. 295. b. Cr. Jac. 293. 2 Sand. 46. Yelverton 211. 1 Bulst. 159, 160, 161 F. N. B. 5. n. 11. a.

Cases

Caſes of Executions.

Mich. 38 & 39 Eliz.

Rot. 259. *in the King's Bench.*

BLUMFIELD's *Caſe.*

IN an *Audita querela* between *Blumfield* and *(a) Uſewick* the Caſe was; Two Men were bound jointly and ſeverally in Bond, one was ſued, condemned, and taken in Execution; and afterwards the other was ſued, condemned, and taken in Execution, and afterwards the firſt eſcaped, and thereupon the other brought *Audita (b) querela*: And although the Plaintiff might have an Action on the Eſcape againſt the Sheriff, yet until he be ſatisfied in Deed, the other cannot have *Audita querela*; and Peradventure the Sheriff is worth nothing; and if the Defendants had been ſued by one Writ by ſeveral *Præcipes*, although the Entry ſhall be, *quod unica fiat executio*, that is to be intended of an Execution with Satisfaction, for he ſhall have both their Bodies in Execution, *(c)* 4 *H.* 7. 8. & 29 *H.* 8. *Execution Br. acc'.* 132. And ſo is the Book in 4 *E.* 4. 38. & 5 *E.* 44 to be intended. *Hill.* 33 *El.* it was adjudged in the Com. Pleas between *Linacre* and *(d) Rhodes*, That notwithſtanding the Conuſor on a Stat. Staple be taken and eſcapes, yet his Goods and Lands on the ſame Statute may be extended, for the Eſcape and the Action which the Plaintiff has againſt the Sheriff for the Eſcape, is no Satisfaction of the Debt. So if the Conuſor be taken and dies in Execution, the Conuſee ſhall have Execution of his Goods and Lands. And it was adjudged *Paſch.* 24 *Eliz.* in the Com. Pleas between *Jones* and *(e) Williams*, That where two Men were condemned in Debt, and one was taken and died in Execution, yet the taking of

(a) Moor 459. Cr. El. 478, 479, 555, 574. 3 Keb. 306.
(b) 1 Rol. 308. Cr. Jac. 338, 339, 532, 694. 2 Bulſt. 97, 98, 99, 100. 1 Rol. Rep. 8, 9. Godb. 257, 258 1 Rol. Ab. 896 Cro. Car. 75. Cr. Execut. 145. 2 Show. 394.
(c) God. 208. Cr. Jac. 338. 2 Bulſtr. 98. Hob. 59.
(d) 1 And. 266. 1 Leon. 230. 2 Leon. 96. 1 Rol. Rep. 204.
(e) Cr. El. 851. Cr. El. 851. 1 Rol. 903. 1 Rol. Rep. 9. Hob. 59.

of the other was lawful. And then it was resolv'd by the whole Court, that if the Def. in Debt (*a*) dies in Execut. the Pl. may have a new Execution by *Elegit*, or *Fieri facias* for divers Reasons.

1. Because the Pl. shall not be prejudiced nor the Def. benefited by the Act and Wrong of the Def. in Non-payment of his Debt, when no Default is in the Pl. he having pursued the due and ordinary Course of Law.

2. The Execut. of the Body is no (*b*) Satisfaction (as appears in 4 *H.* 7. 8. & 33 *H.* 6. (*c*) 47. *Hillary*'s Case adjudged) but a Gage for the Debt; as where a Man has return irrepleviſable awarded, as it is said in 33 *H.* 6. 46. and therefore after his Death he shall resort to a new Execut. And the Words of the *Capias ad satisfac'* are, *Cap. I. de S. Ita qd' hab' corp' ejus cor' Justic' nostr', &c. ad satisfac' G. de K. de debito & damn', &c.* So that his Body is taken to the Intent that he shall satisfy, and when the Def. pays the Mony, he shall be discharg. out of Prison.

3. The Death of the Def. is the Act of God, which shall not turn to the Prejudice of the Pl. as it is said in * *Trewmyard*'s Case 33 *H.* 8. *Dy.* 60. the Pl. shall not be prejudic'd of his Execut. by Act of Law, which doth not Wrong to any one.

4. It would be mischievous to the Pl. to lose his Debt without any Default in him, and no Mischief if a new Execution should be done, for nothing would be liable to his new Execution, but the Lands and Goods of the Def. which in Law and all Equity ought to be subject to the Payment of his Debts. And is not like when the Pl. has Execut. of the Lands of the Def. and afterwards the Lands are evicted, there before the Stat. of 32 *H.* (*d*) 8. he should not have any new Execut. for the Execut. of the Lands was valuable and accounted in Law for a Satisfaction, and for avoiding of Infiniteness there should be but one valuable Execut. or Execut. with Satisfact. at the Com. Law; but Execut. of the Body is no valuable Execut. and therefore the Pl. after his Death shall have a new Execut. till he has had a valuable Execut. (*e*) which is the End and Fruit of his Suit: *Et finis rei attend' est, & fines mandator' Dom' Reg' per rescript' sua (sc. brev') diligent' sunt observandi.*

So note Reader, good Differences between Execut. not valuable, (as of the Body of the Def.) and Execut. valuable, as of Lands, &c. And therefore if a Villain be delivered to one in Execut. on a Recovery in Value, and afterwards the Villain dies without Issue, yet the Demandant shall never have a new Execut. for his first Execut. was valuable, and by the Law a Man shall never have but one valuable Execut. Note also a Difference between an Execut. final, as where the Sheriff levies the Money of the Def. Goods, or extends his Lands and delivers them to the Pl. for that the Party accepts in Satisfaction, and that is the End of the Suit, and all that the King's Writ commands to be done; and between Execut. with (*f*) *quousq; &c.* tending to an End, and which is not final, as in

(*a*) Lit. Rep. 325, 326. 1 Rol. 903. Cr. Jac. 136. 143. Moor 857, 858. Cr. El. 850, 851.

Hob. 59, 60, 61. 21 Jac. c. 24. Hetl. 159.

(*b*) Cr. Jac. 338.

(*c*) 2 Bulst. 97, 99. Hob. 59. 1 Rol. Rep. 9.

* Godb. 273.

(*d*) 32 H. 8. c. 5. Cr. Jac. 694. Co. Lit 289. b. 4 Co. 66. a.

(*e*) Godb. 294.

2 Show. 324.

(*f*) 2 Bulst. 98.

In the Case of a *Cap' ad satisfaciend'*, *&c.* it is not final, but his Body is to be taken to the Intent and Purpose that he shall satisfy the Party, and his Imprisonment is not absolute, but *quousque* the Def. shall satisfy the Party: But Execution final is when the Party is satisfied; and because he dies before Satisfaction it consists with Law and Equity, that the Plaintiff should resort to a new Execution. *Vide Regist. & F. N. B.* 246. If a Man has recovered Damages in Trespass before Justices of *Oyer* and *Terminer*, and has the Body of the Party in Execution *quosque satisfecerit* the Plaintiff, and he who is in Execution dies, he who recovered shall sue a *Certiorari* to the Justices to remove the Record into the King's Bench, that the Justices there may do on that Record as the Law requires in such Case; and that is to award a new Execution, 47 *E.* 3. Tit. *Execution* 41. If in Trespass the Pl. recovers, and the Def. is taken for the King's Fine, if he pray that the Def. may remain in Prison till he be satisfied, he shall not have an *Elegit*, because he has taken Execution of his Body and has it; but if the Party dies in Prison, so that he has not Execution with Satisfaction wherein is no Default of him, he shall have an *Elegit* afterwards, because he cannot have Satisfaction according to the first Election; and these are the Words of the Book. And therewith agrees *Fitz. N. B.* 246. *b.* And if the Conusee of a Statute-Merchant or Staple, *&c.* be taken and dies in Execution, yet the Conusee shall have Execution without Doubt of his Goods and Lands, as it was resolved in (*a*) *Linacre*'s Case. And so you will better understand your Books in 22 *Ass.* 43. 33 *H.* 6. 46, 47. 4 *E.* 4. 38. 5 *E.* 4. *Br. Execution* 79. 41 *E.* 3. 13. *in Accompt*, &c.

(*a*) 1 And. 266. Hob. 60. 1 Leon. 230. 2 Leon. 96. 1 Rol. Rep. 204. Antea 86. b.

Hill. 40 Eliz. *Rot.* 114.

GARNON's *Case.*

BEtween *Layton* Plaintiff, and *Garnon* Sheriff of the County of, *&c.* Defendant, the Case was such; *Layton* recovered against *Wallwen* in the Common Pleas in an Action of Debt, and sued forth a *Capias ad satisfaciendum*, and *ex post Ca.* and outlawed the Defendant; the Defendant brought a Writ of Error, and the Judgment was affirmed: And thereupon within the Year a *Capias utlagatum* was awarded, and the Defendant was taken, and the Sheriff suffered him to escape before the Return of the Writ; and on this Escape the Plaintiff brought this Action. And in this Case three Points were resolved.

Moor 566, 567. Cr. El. 706, 707. 1 Rol. 810, 895. 1 Leon 263. Cr. Jac. 361.

1. If one at the Common Law had Judgment in an Action of Debt, and after the Judgment outlawed the Defendant, the Plaintiff was at the End of his Suit as to any Process to be sued by himself, for he could not have a *Scire fac'*, nor any other Process on the Judgment, but was put to his (*a*) new Original, as it is agreed in 13 *H.* 4. 1. *a.* 21 *E.* 3. 55. 20. *E.* 3. *Nonability* 8. *acc.* And although before the Statute of 25 *E.* 3. *Capias* did not lie in Debt, nor was the (*b*) Body of the Defendant before that Statute subject to Execution for Debt, as appears before in Sir *Will. Harbert's* Case: Yet if the Defendant be taken by *Capias utlagatum* at the King's Suit no Laches being in the Plaintiff in continuing of his Process, he should be in (*c*) Execution for the Plaintiff if he would: For inasmuch as the King by the original Suit of the Party is intitled to have all his Goods and Chattels, and the Profits of his Lands by the Outlawry, and his Body also in Prison, it is reasonable that if the Defendant in such Case be taken at the King's Suit, that as the King shall have Benefit by the Suit of the Party, so the Party shall have some Benefit by the Suit of the King.

(*a*) Co. Lit 291. a. 2 Bulst. 63. Cart. 124. Cr. El. 706, 124. Cr. El. 706. 3 Co. 12. a. (*b*) 1 Brown 118. 2 Bulstr. 63. (*c*) Yelv. 19, 20. Bridg. 7. 1 Rol. 810, 895. Cr. El. 706. Moor 567, 598. Hob. 57.

2. It was resolved, That if Judgm. be given in the Com. Pleas, and removed by a Writ of Error, and Judgm. affirmed within the Year, and (*d*) they award a *Capias*, or a *Fi. fa.* the Plaintiff

(*d*) Godb. 372, 373. Cr. El. 416. 2 Inst. 471. Cart. 180.

Plaintiff is not put to a *Scire facias*, altho' it be in another Court, against the Opinion of 14 *H.* 7. 15, 19. *Vide* 21 *Ass. p.* 14. *F. N. B.* 267.

3. It was resolved, That in the Case at Bar, when he was taken by *Capias utlagatum* which issued out of the King's Bench, he should be in *(a)* Execution for the Plaintiff presently after his Arrest if he would, although his Body be never brought into Court, and altho' the Court do not commit him in Execution for the Party. *Vide* 7 *H.* 6, 6. *Nota bene*, in all Cases when the Plaintiff may have a *Capias ad satisfaciendum*, and the Party Defendant is taken by *Capias (b) pro fine*, there the Defendant is in Execution presently, if the Plaintiff will, without any Prayer of the Party. Also in all Cases when the Plaintiff may have Execution presently by *Fieri facias*, although he cannot have a *Capias*, nor does a *Capias* lie in such Action; as in Assise with Force and Redisseisin, &c. and the Party is taken by *Capias pro fine*, and is committed at the King's Suit, there the Plaintiff may pray that he may remain in Execution for his Damages, but without Prayer he shall not be in Execution, altho' he may have Execution by *Fieri facias*. And when the Pl. has Judgment and *(c)* surceases his Time, so that he cannot have present Execution neither by *Capias* nor by *Fieri facias*, &c. but is put to a *Scire fac'*, there if the Defendant be taken by *Capias (d) pro fine*, the Plaintiff may pray that he may remain in Execut. for him, but that shall not be *(e)* without Prayer of the Party. See for Proof of these Differences 11 *H.* 7. 15. 13 *H.* 7. 21. 7 *H.* 6. 6. *a.* 36 *H.* 6. 23. *F. N. B.* 121. *P.* 6 *E.* 4. 4. *a.* 2 *R.* 3. *Execution* 16. 7 *H.* 4. 4. *b.* &c. Observe good Reader this Case well, and all these Books, for these Points touching Execution (which is the Life of the Law) are necessary to be known.

(a) 1 Sid. 380. Cr. El. 652, 706, 850. Yelv. 19, 20. 1 Rol. 810, 895. Bridg. 7. Moor 567. Hob. 57, 115. Postea 89. a.

(b) Moor 567. Bridg. 7.

(c) Bridg. 7.

(d) Moor 567. Cr. El. 467. 1 Leon. 263. Bridg. 7. Hob. 57.

(e) Salk. 319. 5 Mod. 200. Comb. 373.

Trin

Trin. 41 Eliz.

In the Common Pleas.

FROST's *Case.*

FROST recovered Debt and Damages against *B.* in the Common Pleas, 29 *Eliz.* and on an *ex post Capias* the Defendant was outlawed, and after the Year the Plaintiff procured a *Capias utlagatum* against him, and delivered it to the Sheriffs of *London.* And that one *Laborn* one of the Serjeants of the Sheriffs of *London* had arrested the said *B.* in *Fleetstreet* at the Suit of one *A. ad respondend',* &c. before the Sheriffs, *Laborn* kept *B.* in his House, and then *Frost* came to *Laborn* with the Sheriffs Warrant to arrest him on the *Capias utlagat'* which he absolutely refused. And afterwards the Sheriffs suffer'd the said *B.* to go at large; and on this Matter *Frost* brought an Action on the Case against the Sheriffs, and supposed that the Sheriffs arrested the said *B.* by Force of the said *Capias utlagat',* and that the Sheriffs suffered him to go at large: The Defendants pleaded, *Non permiserunt eum ire ad largum;* and the Jury found all the special Matter. And Judgment was given for the Plaintiff. 1 Leon. 263; Bridg. 7.

For 1. They resolved, That when a Man is in the Custody of the Sheriff by Process of Law, and afterwards another Writ is delivered to him to arrest the Body of him who is in his Custody, presently he is in his (*a*) Custody by Force of the second Writ by Judgment of Law, although he do not actually arrest him; for to what Purpose should he arrest him who is and was before in his Custody? *Et* (*b*) *lex non præcipit inutilia, quia inutilis labor stultus:* And the Words of the *Capias ad satisfaciendum* are not only, *quod capiat,* &c. but *quod salvo custodiat,* &c. *Ita quod habeat corpus,* &c. So that although he cannot take him (whom he has) in his Custody, yet he may safely keep him; and therewith agrees 7 *H.* 4. 30 *b.*

(*a*) Cr. Jac. 486. Antea 88 b. Comb. 435.

(*b*) 2 Rol. Rep. 408. Ant. 241. a. Hardr. 387. Co. Lit. 127. b. 197. b.

2. The Verdict well warrants the Declaration, for in Judgment of Law it is equipollent, and amounts to as much as if the Sheriffs had arreſted the ſaid *B.*

(*a*) Cr. El. 467. Antea 22. 5 Mod. 200. Salk. 319. Comb. 3-3. (*b*) Dy. 172. pl. 11.

3. That although the *Capias utlagat'* was ſued after the Year, ſo that the Defendant could not be in (*a*) Execution without Prayer of the Party, *&c.* yet the Plaintiff is prejudiced by his Eſcape, for he ought not to be diſcharged of the Impriſonment till he find Sureties to ſatisfy him by the Statute of 5 (*b*) *E.* 3. *cap.* 12.

Trin. 42 Eliz.

In the Exchequer.

HOE'S *Caſe.*

Moor 462. Cart. 19.

BEtween *Clement Hoe* Executor of *John Hoe* Plaintiff, and *Boulton* Defendant, the Caſe was ſuch; *John Hoe* the Teſtator had Judgment to recover in the King's Bench againſt *Boulton* 75 *l.* 3 *s.* 4 *d.* *John Hoe* aſſigned it by Deed inrolled to the Queen in Satisfaction of a Debt due to the Queen by him as Collector of Fifteens, with Proviſo, that if the Lord Treaſurer and Barons of the Exchequer, or any two of them, becauſe the Debt could not be levied in convenient Time, or for any other reaſonable Cauſe diſallow'd of the ſaid Aſſignment, and revoked it by Writing under their Hands, then the Aſſignment ſhould be void. And afterwards *Boulton* brought a Writ of Error according to the new Statute, and there Judgment was affirmed, and 5 *l.* Coſts on the Affirmance of the Judgment: And afterwards (on Proceſs which is called a Writ of Prerogative out of the Exchequer on the ſaid Aſſignment) the Lands of *Boulton* were extended, and his Goods which were of Value above the ſaid Debt

27 El. cap. 8.

Debt aſſigned were ſeiſed by the Sheriff by Force of the ſaid Writ, but the Writ was not returned. And afterwards *Periam*, *Ewens*, and *Southerton*, 3 of the Barons, revoked the Aſſignm. after the Teſtator's Death, becauſe the Teſtator had ſatisfied the Debt which was due to the Queen by him as Collector. And now the Pl. as Ex'or of *J. Hoe* ſued a *Scire facias* to have Execut. of the ſaid 75 *l.* 3 *s.* 4 *d.* & 5 *l.* Coſts: And the ſaid Matter being diſcloſed by ſpecial Pleading, a Demur. in Law was joined. And in this Caſe three Points were reſolved.

1. That the Execut. for the Queen was good without Queſtion, as to the Goods, altho' the Writ was not returned. And ſo it is in Caſe of a com. Perſon, if the Sheriff by Force of a Writ of *Fieri facias* levies the Debt, and delivers it to the Party, the Execut. is good without a Return of the Writ, as it is adjudged 20 *H.* 6. 24. *a.* & 21 *H.* 6. 5. *a.* And ſo was it adjudged in the Com. Pleas, *Paſch.* 23 *El.* between *Rook* and *Willimote*; and *Trin.* 23 *El.* between *Mount* and *Andrews*; and therewith agrees 44 *E.* 3. 18. So if a Man be taken on a *Capias ad* (*a*) *ſatisfaciendum*, the Execution is well done, although the Writ be never returned: And the Difference is apparent between *Capias* in Proceſs, and *Capias ad ſatisfaciendum*, for if the *Capias* (*b*) in Proceſs be not returned, the Arreſt is tortious, for there the End of the Arreſt is to the Intent the Party ſhould appear and anſwer the Pl. but in all Writs of Executions when the Sheriff alone does it, as *Capias ad ſatisfaciendum*, *Habere facias ſeiſinam*, or *poſſeſſionem*, *Fieri fac'*. *Liberat'*, &c. If the Execution be duly done it is good, although the Writ be not returned, for there the Plaintiff has the Effect of the Suit, and no other Thing is to be done on his Part after: But in Caſe of (*c*) *Elegit*, becauſe there the Extent is to be made by Inqueſt, and not by the Sheriff only, it ought to be returned, otherwiſe it is nought worth. So by theſe Reſolutions in the Caſe at Bar, and by the ſaid Judgments here cited, you will learn the Law, and better underſtand your Books in 19 *E.* 3. *Scire facias*, 11 *H.* 4. 73. *b.* and (*d*) *Fulwood's* Caſe in the fourth Part of my Reports.

(*a*) Cr. El. 17. Lane 52. 21 H. 7. 23. a. 16 H. 7. 14. a. b. 20 H. 7. 13. Cro. Car. 447. Mo. 57. Owen 48. 4 Co. 67. a.

(*b*) 2 Rol. 563. Lane 52. 21 H. 7. 23. a. 4 Co. 67. a.

(*c*) 4 Co. 67. a.

(*d*) 4 Co. 67. a.

Note Reader, that the ſaid Judgments given in the Caſe of the *Fieri facias*, where Execution was done, and no Writ returned, were given on great Reaſon.

1. Becauſe the Levying of the Debt was lawful, and well done, and the Party Def. cannot reſiſt the Sheriff to levy the Money.

Cro. El. 208, 209.

2. The Effect of the Authority which the Sheriff had by by Force of the *Fieri facias* was executed.

Cro. Car. 328, 539. Hob. 206. Sav. 1-3.

3. The great Prejudice that the Def. (whoſe Goods and Chattels are ſold by the Writ and Proceſs of Law, for the Satisfaction of his Debt) would have, if the Sheriffs not returning of the Writ ſhould cauſe a new Execut. to be ſued forth againſt him, and leave the Def. to his Action againſt the Sheriff.

Cro. El. 390. Salk. 323. 2 Show. 166.

4. If the Sale of the Goods by Force of the Writ, should by the Non-return of the Writ be wrongful, then the Sheriff would never find Buyers of the Goods of any Def. by Force of any Writ of Execut. which would be inconvenient, and a great Delay of Execut. which are the Fruit and the Life of every Suit; and where the Words of the Writ of *Fieri fac'* are, *Ita qd' habeas denar', &c.* they are but Words of Command to the Sheriff to make Return, which if he do not he shall be amerced, but yet the Execut. shall stand in Force.

Cro.Car.539. 2Show.79,281.

2. It was resolved, That after Execut. had by the Queen, the Revocat. came too late, for then the Queen had had the Effect and End of the said Assignment, and that which was executory when it was assigned, is now executed by lawful Process of Law, and therefore cannot be revoked; for when one has a Power of a Revocat. yet if he suffers any Thing to be lawfully executed by Force of it, as to that he cannot make any Revocat.: As if a Man makes a Letter of Attorney to make Livery, before Execut. he may revoke it, but after Execut. lawfully had, it is executed, and cannot be revoked. *Vide* 7 *b. H.* 6. 41. in Detinue, where the Case was; In Detinue of a Statute-Merchant the Def. prayed Garnishment, the Pl. recovered against the Garnishee by erroneous Judgment, by Force whereof the Defendant delivered the Statute to the Pl. who had Execution; and afterwards the Garnishee reversed the Judgment in a Writ of Error, by which he had restored all that he lost, by that the Execut. shall not be avoided: But I conceive in such Case he shall be helped by *Audita Querela. Vide* 7 *E.* 4. 2. If one, to whom another is indebted, be outlawed, and he who is indebted pays the Money to the Queen, and afterwards the Outlawry is reversed, now the Creditor shall recover his Debt against him. So if the Goods of a Man (c) outlawed be sold by the Sheriff on the Writ of *Capias utlagatum*, &c. and afterwards the Outlawry is reversed by Writ of Error, the Defend. shall have Restitution of his Goods; but if the Sheriff by Force of a *Fieri facias* (d) sell Goods, and afterwards the Judgment is reversed by Writ of Error, the Defendant shall not have Restitution of his Goods, but the Value of them for which they were sold; and there are 2 Reasons of this Difference. 1. If the Sale of the Sheriff by Force of a *Fieri fac'* should be avoided by subsequent Reversal of the Judgment, there would be no Buyer, and by Consequence no Execution done. 2. In the Case of a *Fieri facias*, the Sheriff is compellable to make and levy the Debt of the Goods, &c. of the Def. and therefore it is great Reason that it should stand: But in the Case of *Capias utlagatum*, the Sheriff or Escheator is not compellable to sell them, but may keep them for the King's Use, and therewith agrees 20 *Eliz. Dier* (e) 363. and *vide* 3 *E.* 3. 51. Recompence in Value on

(a) Dy.49.pl.12.

(b) 7H.6.42 a.b. 8 Co. 142. b. 143. b. Br. Error 66. 1 Rol. 778, 778, 308.

(c) 8Co.143.a. Cr.El. 270,278. Moor 270. 1 Rol. 778. Dyer223.pl.26.

(d) 8 Co 96.b. 143. a. 1 Rol. 778. Dy. 363. pl.24. Mo.573. Jenk.Cent.264. 2 Leon. 92. 3 Leon. 89,90. Godb. 27, 28. Yelv. 180. Goldsb.103,104 Cr. Eliz. 278. Cr. Jac. 246.

(e) Dyer 363. pl. 24.

on a Voucher once lawfully executed, ſhall not be deveſted although the Title of the Demandant to the Land which he recover'd, be afterwards diſaffirmed and evicted.

3. It was reſolved, That the Revocation by three, if no Execution had been had, had been ſufficient; for if three (*a*) revoke, two do it; but if the Words of the Clauſe of Revocation had been by them jointly or ſeverally, then the 3 of them could not have done it, for that had been neither jointly nor ſeverally. And therewith agrees 36 *H.* 8. *Dier* 61, 62. & 27 *H.* 8. And ſo note a good (*b*) Difference.

(*a*) Cr. Jac. 254. 1 Rol. 328.
(*b*) Co. Lit. 181. b. 1 Rol. 329. Yelv. 25, 26. Noy 47. Hutt. 127. 1 Rol. Rep. 299. 2 Inſt. 38. 27 H. 8. 6. b. 1. Co 92. a. Dy. 62 pl. 34. 2 Rol. Rep. 103. 3 Bulſtr. 210.

Mich. 2 Jac.

In the King's Bench.

SEMAYNE's *Caſe.*

IN an Action on the Caſe by *Peter Semayne* Plaintiff, and *Richard Greſham* Defendant, the Caſe was ſuch; the Plaintiff and one *George Berisford* were Jointenants of an Houſe in *Black Fryers* in *London* for Years, *George Berisford* acknowledged a Recognizance in the Nature of a Statute-Staple to the Plaintiff, and being poſſeſſed of divers Goods in the ſaid Houſe, died, by which the Defendant was poſſeſſed of the Houſe by Survivorſhip, in which the Goods continued and remained; the Plaintiff ſued Proceſs of Extent on the Statute to the Sheriffs of *London*; the Sheriffs returned the Conuſor dead, on which the Plaintiff had another Writ to extend all the Lands which he had at the Time of the Statute acknowledged, or any Time after, and all his Goods which he had at the Day of his Death; which Writ the Plaintiff delivered to the Sheriffs of *London*, and told them that divers Goods which were the ſaid *George Berisford*'s at the Time of his Death were in the ſaid Houſe: And thereupon the Sheriffs by Virtue of the ſaid Writ, charged a Jury to make Inquiry according to the ſaid Writ, and the Sheriffs and Jury *acceſſerunt ad Domum prædictam oſtio Domus prædict' aperto exiſten' & bonis prædictis in prædicta Domo tunc exiſten'*, and they offered to enter the ſaid Houſe, to extend

Co. Ent. 12. pl. 11. Mo 668. Yelv. 28, 29. Cr. El. 908, 909. 2 Rol. Rep. 294.

the Goods according to the said Writ; and the Def. *præmissorum non ignarus*, intending to disturb the Execution, *ostio præd' domus tunc aperto existen', claudebat contra Vicecom' & Jurator' præd'* whereby they could not come, and extend the said Goods, nor the Sheriff seise them, by which he lost the Benefit and Profit of his Writ, &c. And in this Case these Points were resolved.

(a) 3 Inst. 162. Cr. El. 753. 2 Co. 32. a. 7 Co. 6. a. 8 Co. 136. a. 11 Co. 82. a. 1 Bulstr. 146. Stanf. Cor. 14. b.

1. That the House of every one is to him as his (*a*) Castle and Fortress, as well for his Defence against Injury and Violence, as for his Repose; and altho' the Life of Man is a Thing precious and favoured in Law; so that altho' a Man kills another in his Defence, or kills one *per infortun'*, without any Intent, yet it is Felony, and in such Case he shall forfeit his Goods and Chatt', for the great Regard which the Law has to a Man's Life; but if Thieves come to a Man's (*b*) House to rob him, or murther, and the Owner or his Servants kill any of the Thieves in Defence of himself and his House, it is no Felony, and he shall lose nothing, and therewith agree 3 *E.* 3. *Coron.* 303. & 305. & 26 *Ass. pl.* 23. So it is held in 21 *H.* 7. 39. every one may assemble his Friends and Neighb. (*d*) to defend his House against Violence: But he cannot assemble them to go with him to the Market (*e*), or elsewhere for his Safeguard against Violence: And the Reason of all this is, because *domus sua cuique est tutissimum refugium.*

(b) Co. Lit. 391. a. Hale's Pl. Cor. 32. Stanf. Cor. 15. c. 16 d. (c) 3 Inst. 56. Stanf. Cor. 14. a. Cor. 192. 3 E. 3. Cor. 205, 330. Br. Cor. 100. 1 Rol. Rep. 152. 22 H. 8. c. 5. (d) 11 Co. 82. b. Br. Riots, &c. 1. 21 H. 7. 39. a. Fitz. Tresp. 246. 2 Inst. 161, 162. (e) 11 Co. 82. b. 1 Rol. Rep. 182.

2. It was resolved, When any House is recovered by any real Action, or by *Eject' firmæ*, the Sheriff may break the House and deliver the Seisin or Possession to the Demandant or Pl. for the Words of the Writ are, *Habere facias seisinam*, or *possessionem*, &c. and after Judgment it is not the House in Right and Judgment of Law of the Tenant or Defendant.

(f) O. Benl. 112. 1 Bulstr. 146. Cr. El. 908, 909. Moor 605, 668. Yelv. 28, 29. Cr. Car. 537, 538. 3 Inst 161. Dy. 36. pl 49. 12 Co. 131. 4 Inst. 177. Goldsb. 70. 2 Jone 2. 3, 234. 4 Leon. 41. 13 E. 4. 9. a.

3. In all Cases when the King (*f*) is Party, the Sheriff (if the Doors be not open) may break the Party's House, either to arrest him, or to do other Execut. of the K's Process, if otherwise he cannot enter. But before he breaks it, he ought to signify the Cause of his Coming, and to make Request to open the Doors; and that appears well by the Stat. of *Westm.* 1. *cap.* 17. (which is but an Affirmance of the Com. Law) as hereafter appears, for the Law without a Default in the Owner abhors the Destruct. or Breaking of any House which is for the Habitat. and Safety of Man) by which great Damage and Inconvenience might ensue to the Party, when no Default is in him; for perhaps he did not know of the Process, of which if he had Notice, it is to be presumed that he would obey it, and that appears by the Book in 18 *E.* 2. (*g*) *Execut.* 252. where it is said, That the K's Officer who comes to do Execut. &c. may open the Doors which are shut, and break them, if he cannot have the Keys; which proves, that he ought first to demand them 7 *E.* 3. (*h*) 16. *J.* beats *R.* so as he is in Danger of Death, *J.* flies, and thereupon Hue and Cry is made, *J.* retreats into the House of *T.* they who pursue him, if the House be kept and defended with Force (which proves that first Request ought

(g) Yelv. 29. Postea 92. b. Cr. El. 909. Moor 668. (h) 4 Inst. 177.

to

to be made) may lawfully break the House of *T.* for it is at the K's Suit. 27 *Ass. p.* 66. the K's Bailiff may distrain for Issues (*a*) in a Sanctuary. 27 *Ass. p.* 35. by Force of a *Capias* on an Indictm. of Trespass the Sheriff may (*b*) break his House to arrest him; but in such Case, if he breaks the House when he may enter without Breaking it, (that is, on Request made, or if he may open the Door without Breaking) he is a Trespassor. 41 *Ass.* 15. on Issue joined on a Traverse of an Office in Chancery, *Venire fac.* was awarded returnable in the King's Bench, without mentioning *non* (*c*) *omittas propt' aliquam libertat'*, yet forasmuch as the K. is Party, the Writ of it self is *non omittas propt' aliquam libertat'*, 9 *E.* 4. 9. that for Felony (*d*) or Suspicion of Felony, the K's Officer may break the House to apprehend the Felon, and that for 2 Reasons: 1. For the Commonwealth, for it is for the Commonwealth to apprehend Felons. 2. In every Felony the King has Interest, and where the King has Interest, the Writ is, *non omittas propter aliquam libertatem*; and so the Liberty or Privilege of an House doth not hold against the King.

(*a*) Br. Distress 35. Br. Trespass 151.
(*b*) Fitz. Trespass 232. Br. Trespass 248.
(*c*) Br. Prerogative le Roy 109. Br. Franchise 18. Br. Process 102. Fitz. Prerogative 21.
(*d*) 13 E. 4. 9. 2. Fitz. Bar. 110. 4 Inst. 177. 1 Bulstr. 146. 2 Bulstr. 61.

4. In all Cases when the Door is (*e*) open the Sheriff may enter the House, and do Execut. at the Suit of any Subject, either of the Body, or of the Goods; and so may the Lord in such Case enter the House (*f*) and distrain for his Rent or Service, 38 *H.* 6. 26. *a.* 8 *E.* 2. *Distr.* 21. & 33 *E.* 3. *Avowry* 256. the Ld. may distrain in the House, altho' Lands are also held in which he may distrain. *Vide* 29 (*g*) *Ass.* 49. But the great Question in this Case was, if by Force of a *Capias* or *Fieri fac'* at the Suit of the Party the Sheriff after Request made to open the Door, and Denial made, might break the Def.'s House to do Execut. if the Door be not opened. And it was objected, That the Sheriff might well do it for divers Causes: 1. Because it is by Process of Law; and it was said, That it would be granted on the other Side, that a House is not a Liberty, for if a *Fieri fac'* or a *Capias* be awarded to the Sheriff at the Suit of a common Person, and he makes a Mandate to the Baily of a Liberty who has Return of Writs, who *nullum dedit respons.* in that Case another Writ shall issue with *non omittas propter aliquam libertat'*, yet it will be said on the other Side, that he shall not break the Def's. House, as he shall do of another Liberty; for whereas in the County of *Suffolk* there are 2 Liberties, one of S. *Edmund Bury*, and the other of S. *Etheldred* of *Ely*, suppose a *Cap'* comes at the Suit of *A.* to the Sheriff of *Suff.* to arrest the Body of *B.* the Sheriff makes a Mandate to the Bailiff of the Liberty of S. *Etheldred*, who makes no Answer, in that Case the Pl. shall have a Writ of *Non omittas*, and by Force thereof he may arrest the Def. within the Liberty of *Bury*, altho' no Default was in him: 2. Admitting it be a Liberty, the Defendant himself shall never take Advantage of a Liberty: As

(*e*) 1 Brown. 50. Cr. Jac. 486.
(*f*) Br. Trespass 226. Br. Issue 26.
(*g*) Br. Dissei. for 52. Fitz. Assis. 286.

If the Bailiff of a Liberty be Def. in any Action, and Proceſs of *Cap'* or *Fieri fac'* comes to the Sheriff againſt him, the Sheriff ſhall execute the Proceſs againſt him, for a Liberty is always for the Benefit of a Stranger to the Action. 3. For Neceſſity the Sheriff ſhall break the Def.'s Houſe after ſuch Denial as is aforeſaid, for at the Com. Law a Man ſhould not have any Execut. for Debt, but only of the Def.'s Goods. Suppoſe then the Def. would keep all his Goods in his Houſe, and ſo the Def. himſelf by his own Act would prevent not only the Pl. of his juſt and true Debt, but there would alſo be a great Imputat. to the Law, that there ſhould be ſo great a Defect in it, that in ſuch Caſe the Pl. by ſuch Shift without any Default in him ſhould be barred of his Execut. And the Book in 18 *E.* 2. (*a*) *Execut.* 252. was cited to prove it, where it is ſaid, that it is not lawful for any one to diſturb the K's Officer, who comes to execute the K's Proceſs; for if a Man might ſtand out in ſuch Manner, a Man would never have Execut. but there it appears (as has been ſaid) that there ought to be Requeſt made before the Sheriff breaks the Houſe. 4. It was ſaid, that the Sheriff was an Officer of great Authority, in whom the Law repoſed great Truſt and Confidence, and are of Sufficiency to anſwer all Wrongs which ſhould be done; and they had *cuſtodiam Comitat'*, and therefore it ſhould not be preſumed that they would abuſe the Houſe of any one by Colour of doing their Office in Execut. of the K's Writs againſt the Duty of their Office, and their Oath alſo: But it was reſolved, That it is not lawful for the Sheriff (on Requeſt made and Denial) at the Suit of a (*b*) com. Perſon, to break the Def.'s Houſe, *ſc.* to execute any Proceſs at the Suit of any Subj. for thence would follow great Inconven. that Men as well in the Night (*c*) as in the Day ſhould have their Houſes (which are their Caſtles) broke, by Colour whereof great Damage and Miſchief might enſue, for by Colour thereof, on any feigned Suit, the Houſe of any Man at any Time might be broke when the Def. might be arreſted elſewhere, and ſo Men would not be in Safety or Quiet in their own Houſes? And altho' the Sheriff be an Officer of great Authority and Truſt, yet it appears by Experience, that the K's Writs are ſerved by Bailiffs, Perſons of little or no Value: And it is not to be preſumed, that all the Subſtance a Man has in his Houſe, nor that a Man would loſe his Liberty which is ſo ineſtimable, if he has ſufficient to ſatisfy his Debt. And all the ſaid Books which prove, that when the Proceſs concerns the King, that the Sheriff may break the Houſe, imply that at the Suit of the Party, the Houſe may not be broken, otherwiſe the Addition (at the Suit of the K.) would be frivolous. And with this Reſolution agrees the Book in (*d*) 13 *E.* 4. 9. and the expreſs Difference there taken between the Caſe of Felony, which (as has been ſaid) concerns the Commonwealth, and the Suit of

(*a*) Yelv. 29. Antea 91. b. Moor 668. Cr El. 400. O. Benl. 121.

The Reſolution of the Court. (*b*) 1 Jones 429. 430. 1 Brownl. 50. 1 Bulſtr. 146. Cr. Jac. 556. O. Benl. 121. 4 Inſt. 177. Palm. 53. Dyer 36. pl. 41. Moor 668. Cr Car. 537. 538. Cr El. 908, 909. Yelv. 29. Hob. 62, 263, 264. 4 Leon. 41. 11 Co. 82. March. 3, 4. 18 E. 4. 4. a. Br. Execut. 100. Br. Treſpaſs 350.

(*c*) 9 Co. 66. a. Cr. Jac. 280, 486. Jenk. Cent. 291. Hale's Pl. Cor. 45. Owen 63.

(*d*) 13 E. 4. 9. a. Antea 92. a. Firz. Bar 110. 4 Inſt. 177.

of any Subject, which is for the particular Interest of the Party, as there it is said in (a) 18 *E.* 4. 4. *a.* by *Littleton* and all his Companions it is resolved, That the Sheriff cannot break the Defendant's House by Force of a *Fieri facias*, but he is a Trespassor by the Breaking, and yet the Execution which he then doth in the House is good. And it was said, that the said Book of (b) 18 *E.* 2. was but a short Note, and not any Case judicially adjudg'd, and it doth not appear at whose Suit the Case is intended, but it is an Observation or Collection (as it seems) of the Reporter. And if it be intended of a *Quo* (c) *minus*, or other Action in which the King is Party, or is to have Benefit, the Book is good Law.

(a) Cr. Eliz. 909. Yelv. 29. Br. Execution 100. Br. Trespass 390.

(b) 18 E. 2. Execution 252. Yelv. 29. Moor 668. Cr. El. 909. Antea 91. b. 92. b. 0 Benl. 121.

(c) Plowd. 208. a. 2 Show. 87.

5. It was resolved, That the House of any one is not a Castle or Privilege but for himself, and shall not extend to protect any (d) Person who flies to his House, or the Goods of any other which are brought and conveyed into his House, to prevent a lawful Execution, and to escape the ordinary Process of Law; for the Privilege of his House extends only to him and his Family, and to his own proper Goods, or to those which are lawfully and without Fraud and Covin there; and therefore in such Cases after Denial on Request made, the Sheriff may break the House; and that is proved by the Statute of *West.* 1. *c.* (e) 17. by which it is declared, That the Sheriff may break an House or Castle to make Replevin, when the Goods of another which he has distrained are by him conveyed to his House or Castle, to prevent the Owner to have a Replevin of his Goods; which Act is but an Affirmance of the Common Law in such Points. But it appears there, that before the Sheriff in such Case breaks the House, he ought to demand the Goods to be delivered to him; for the Words of the Statute are, After that the Cattle shall be solemnly demanded by the Sheriffs, *&c.*

(d) Cr. Car. 544.

(e) 2 Inst. 192, 193, 194.

6. It was resolved, admitting that the Sheriff after Denial made might have broke the House, as the Plaintiffs Counsel pretend he might, then it follows that he has not done his (f) Duty, for it doth not appear, that he made any Request to open the Door of the House. Also the Defendant as this Case is, has done that which he might well do by the Law, *scil.* to shut the Door of his own House.

(f) Stile 447.

Lastly, the general Allegation, (g) *præmissorum non ignarus* was not sufficient in this Case, where the Notice of the Premisses is so material; but in this Cause it ought to have been certainly, and directly alledged, for without Notice of the Process of Law, and of the Coming of the Sheriffs Bailiff to execute it, the shutting of the Door of his own House was lawful. And Judgment was given against the Plaintiff.

(g) Hard. 2. 1 Mod. Rep. 286.

Trin.

Trin. 39 Eliz.

In the Exchequer.

BARWICK's *Case.*

1 Co. 43. b. Moor 393, 394. 10 Co. 68. a. 2 Rol. Rep. 273. 3 Keb. 414. Stile 189. Hardr. 499. Lane 11.

IN an Information of Intruſion into a Houſe and certain Lands in *Sutton* in *Galtres* in the County of *York*, againſt *Peter Barwick* and others, the Caſe was ſuch: *E.* 6. by his Letters Patents 19 *Maii*, *anno* 4. demiſed the Manor of *Sutton*, whereof, *&c.* to *Thomas Tirril* for 21 Years: And afterwards Queen *Elizabeth* having the Reverſion, by her Letters Patents 11 *Maii*, in the 10th Year of her Reign reciting the ſaid Leaſe, demiſed the ſaid Manor to *Humphrey Barwick* for 21 Years in Reverſion: *Humphrey Barwick* 2 *Auguſti*, 10 *Eliz.* by Indenture granted to one *Story* a Houſe and Croft Parcel of the ſaid Manor, from the Feaſt of S. *Michael* 1597, for 21 Years, and 20 *Maii*, 16 *Eliz.* demiſed to *John Ragget* another Parcel of the ſaid Manor for 21 Years, from the ſaid Feaſt of S. *Michael*; and another Demiſe of another Parcel to *William Simpſon* for the like Term. And afterwards Queen *Eliz.* 21. *Nov. anno* 23. by her Letters Patents (reciting (*a*) the ſaid Leaſe to *Humphrey Barwick*) *pro & in conſideratione rurſum* (*b*) *reddi-tionis totius ſtatus, tituli, termin' annor' & intereſſe, de & in præmiſſ. per præd' literas paten' eidem* Humfrido *conceſſ.* demiſed and granted the ſaid Manor to the ſaid *Humphrey* for 21 Years, whereas in Truth the ſaid *Humphrey* had not ſurrendred all the ſaid Term granted to him, for he had made divers Aſſignments and Demiſes, as is aforeſaid. And afterwards Queen *Eliz.* 28 *Julii*, *anno* 1[illegible] in Conſideration of the Surrender of the ſaid Letters Patents *de anno* 23 *Eliz.* and of all the Eſtate, Term and Intereſt by them demiſed and granted, demiſed and granted the ſaid Manor to the ſaid *Humphrey*, *Habend' a* (*c*) *confection' earund' literar' patent'*, for the Lives of 3 others and the Surviv. of them: And under this later Demiſe the De-

(*a*) Cr. Car. 198.

(*b*) Godb. 442.

(*c*) Alcin 77.

claime[illegible]

claimed. And whether this later Leaſe was good or not, was the Queſtion. And after many Arguments at Bar and Bench Judgment was given by Sir *William Periam* Chief Baron, and the whole Court of Exchequer for the Queen. And in this Caſe two Points were reſolved;

1 Inaſmuch as the valuable and material Conſiderat. of the ſaid Letters Patents for three Lives being falſe, and thereby the Queen deceived, by Conſequence the ſaid Leaſe for three Lives was void; for the Conſideration was, That the ſaid former Leaſe ſhould be ſurrendred, and in Truth the former Leaſe was void, ſo the Cauſe and Motive Cauſe of making the Leaſe was falſe; and therefore the ſaid later Leaſe made on ſuch Conſideration was void alſo. And the former Leaſe *de anno* 23. was void, becauſe it was made in Conſideration of the Surrender of all the Eſtate, Term, and Intereſt demiſed by the Letters Patents *de anno* 10 *Eliz.* whereas in Truth all the Eſtate was not ſurrendred: For he had made divers Demiſes and Grants of certain Parcels of the ſaid Manor before, and that might be very miſchievous to the Queen, for her Leſſee might demiſe all the Land to him demiſed ſaving a ſmall Parcel, and for a ſmall Term in Reverſion, and after ſurrender to the Queen, and take a new Leaſe with Reſervation of Rent, and Condition of Re-entry; and in that Caſe neither the new Rent, nor the Condition would extend to the Eſtates and Intereſts derived out of the firſt Leaſe. And it is a Maxim, That if the Conſideration which is for the Benefit of the Queen, be it executed, or executory, or be it on Record or not on Record, be not true or not duly performed, or if Prejudice may accrue to the Queen by Reaſon of non-performance of it, the Letters Patents are void. And in the Caſe at Bar it was for the Advant. and Benefit of the Queen, that the whole former Term *de anno* 10 *Eliz.* ſhould be ſurrendred accord. to the expreſs Conſideration, to the Intent that the Rent, and Condition reſerved on the new Leaſe *de anno* 23. ſhould extend to all the Land demiſed according to the Purport and true Intention of the ſaid Letters Patents. Alſo when the Queen made the Leaſe for three Lives in Conſideration of the Surrender of the ſaid Leaſe *de anno* 23. which Leaſe was void, hence it follows that the Demiſe made in Conſideration of that Surrender was void alſo, becauſe the Queen was deceived in the Conſideration of her Demiſe; for the Surrender of the former Term was a principal Motive to induce the Queen to make a new Leaſe, and perhaps to mitigate her Fine; which Conſideration being valuable and material, ought to be truly and duly performed.

2. It was reſolved, That when the Queen 28 *Julii, an.* 26. demiſed the ſaid Manor to *Humph. Barwick, Habend' ſibi a confection' earund' literar' patentium*, that the ſaid 28 Day of *July* it ſelf is without Queſt. excluded and that the Demiſe cannot

2 Rol. Rep. 273. Davis 40. a. 1 Co. 43. b. Lane 3, 13, 76, 109, 112. Hard. 499. Hob. 204, 230. Moor 393. Hutt. 7.

2 Rol. Rep. 273.

Dy. 352. pl. 26.

Antea 1. a. b. Co. Lit. 46. b.

cannot begin, nor the Leſſee enter, before 29 of *July*, for this (*a*) [*a*] or [*ab*] *eſt dictio ſignificativa primi termini, a quo, ſicut dictio (uſque) termini, ad quem*; & [*a*] *vel* [*ab*] *accipitur excluſive.*

(*a*) Stile 189. Cr. Car. 94. Moor 759.

3. It was reſolved, That an Eſtate of Freehold could not by the Common Law begin (*b*) *in futuro*, but ought to take Effect preſently in Poſſeſſion, Reverſion, or Remainder. And the Difference is between a Leaſe for Life, and a Leaſe for Years: For a Leaſe for Years may begin *in futuro*, but not a Leaſe for Life. As if a Man makes a Leaſe for Years to begin at *Michaelmas* next enſuing, it is good; but if a Man makes a Leaſe for Life to begin at *Michaelmas* it is void; And the Reaſons and Cauſes of this Difference are; 1. Becauſe a Leaſe for Years may be made without Livery of Seiſin, but ſo cannot an Eſtate of Freehold without Livery, either in Fact or in Law: And therefore when a Man makes a Leaſe for Life to begin at a future Day, he cannot make preſent Livery to a future Eſtate; and therefore in ſuch Caſe nothing paſſes: And it was ſaid, that Letters Patents under the Great Seal amount to a Livery in Law; and therefore by Letters Patents a Leaſe cannot be made for Life to begin at a Day to come. 2. If any Freehold ſhould paſs preſently by the Letters Patents from a Day to come, then the Queen in the mean Time would have a particular * Intereſt and Term without any (*d*) Donor or Leſſor, which would be againſt the Rules of the Law. But no ſuch Conſequent will follow in the Caſe of a Leaſe for Years; and therefore it was reſolved in the Caſe at Bar that the Leaſe for three Lives was void, becauſe it was to begin the next Day after the *Teſte* of the Letters Patents: And if the Leaſe ſhould be good, the Queen would have an Intereſt for the 28 Day; and altho' the Leaſe was to begin the next Day after the *Teſte* of it, it is all one in Law as if it had been to begin 20 or 40 Days, or Years to come, for the Diſtance of the Time doth not make an Alteration of the Law in ſuch Caſe: And in this Caſe it was agreed, That if a Man makes a Leaſe for Years to *A.* and *B.* the (*e*) Remainder to *C.* for Life, in that Caſe the Leſſor ought to make Livery to *A.* and *B.* before their Entry, and by the Livery to *A.* and *B.* *C.* ſhall take a preſent Eſtate for Life by Way of Remainder, by Force of the Livery made to the Leſſees for Years. And therewith agrees *Lit. lib.* 1. *fol.* 12. *b.* And in ſuch Caſe a Difference was taken by ſome, between two joint (*f*) Attornies, who have expreſs Authority to take Livery and Seiſin by Deed, and two joint Leſſees in the Caſe aforeſaid who have Power to receive Livery for the Benefit of another by Warrant in Law; for Livery made to one Attorn. in the Name of both is not good, for he doth not purſue his expreſs Warrant, for he himſelf only has not a Warrant, for they both make but one Attorney: But in the Caſe of two joint Leſſees

(*b*) Moor 393, 394, 423, 424, 881. Cr. El. 29, 254, 255, 450, 585. 2 Anderſ. 29. Cr. Car. 547, 548. Cr. Jac. 376, 563. 1 Jones 437. Godb. 265, 451. 1 Rol. Rep. 109, 110, 138, 253, 254, 256, 261. 4 Leon. 8. Co. Lit. 48. b. 11 Co. 77. a. 78. a. 2 Rol. 10, 66. Br. Patent. 29. 2 Bulſtr. 272, 273, 274, 275, 303. Hob. 171. Palm. 29, 30. Bridg. 108, 109. 2 Brownl. 299, 300. Herl. 23. 2 Co 55. a.

(*c*) Cr. Jac. 153, 563 Cr. Car. 94, 388.

* Perk. ſect. 704.

(*d*) Palm. 30.

(*e*) Co. Lit. 49. b.

(*f*) Co. Lit. 49. b. Palm. 23.

Leſſees, the Livery made to one in the Name of both is good, for they two have an Intereſt in the Land before their Entry, and the Livery to one in the Name of both, makes an actual Poſſeſſion in both, which is ſufficient to ſupport the Remainder to *C.* And in the one Caſe the Livery is made to the Leſſees who have Intereſt, and in the other to him who made the Warrant of Attorney by his Attornies, who have but a bare Authority. And although Livery cannot be made to one in the Name of him and of another who is abſent, whereby any Eſtate of Freehold ſhall paſs to him who is abſent without Deed, becauſe his Eſtate is only to begin by the Livery: Yet when a Leaſe is made to two for Years without Deed, the Remainder for Life, the Leſſees preſently have Intereſt in the Lands before any Livery made; and therefore Livery made to one who has an Intereſt in the Name of him and the other, is ſufficient to that Purpoſe. Co. Lit. 49. b. Co. Lit. 49. b.

Note (good Reader) I have reported this Caſe, to the intent that the Imperfections in the Letters Patents made to *Barwick*, by which he loſt his Leaſe, ſhould be avoided in Leaſes, (and principally to poor Men) to be made in Times to come.

Mich.

Mich. 39 & 40 Eliz.

In the King's Bench.

GOODALL's *Case.*

Jenk. Cent. 261.
1 Rol. 408, 421.
Goldsb. 176, 177.
Godb. 299, 449.
Cr. El. 383, 384.
Lit. Rep. 105, 175.
Moor 708, 709.
Poph. 99, 100.

BEtween *Cuthert Goodall* Plaintiff, and *John Wyat* Defendant, in an *Ejectione firmæ* of Lands in *Ailesbury* in the County of *Buck.* (which began *Hill* 37. *Rot.* 805.) The Defendant pleaded Not Guilty: And the Jurors gave a special Verdict to this Effect; Sir *John Packington* was seised of the Tenements aforesaid in Fee, and by his Deed indented, 1 *Julii*, 35 *Eliz.* did thereof enfeoff *Robert Woodcliff* and his Heirs, *Proviso semper quod si præfat'* Johannes *infra unum annum post decessum ipsius* Roberti *solvat, seu solvi faciat hæred', executor', sive administrator' ipsius* Roberti *summ' centum marcarum legalis monet'* Angl', *quod tunc &c. deinceps præsens charta indentata & seisina inde habita, &c. cua sit, & nullius vigoris, Robert Woodcliff* did thereof enfeoff *Edward Woodcliff*, whose Estate by divers mean Conveyances *Thomas Goodall* the Lessor of the Plaintiff had. And afterwards 7 *Jan.* 35 *Eliz.* the said *Robert Woodcliff* died, after whose Death *Drue Woodcliff* being his Son and Heir, and *Anne* his Wife took Letters of Administration of his Goods; by which *Drue* and *Anne* made a Letter of Attorney to *Tho. Goodall* to demand and receive the said 100 Marks on the said Proviso or Condition, of which the said *Thomas Goodall* gave Notice to the said Sir *John Packington*; and afterwards, and within the said Year, it was agreed between the said Sir *John* and the said *Drue*, that the said Sir *John* should pay to the said *Drue* but 32 *l.* of the said 100 Marks, and no more, and yet in Appearance for the better Performance of the Condition, that the whole Sum of 100 Marks should be paid, and that the Residue above 32 *l.* should be repaid to Sir *John*; upon which Sir *John* paid within the said Year 100 Marks to the said *Drue*, and presently all was repaid to the said Sir *John* but the said 32 according

according to their preceding Agreement aforesaid: And afterwards the said Sir *John* did re-enter into the said Tenements, pretending that he had performed the Condition, upon whom the said *Tho. Goodall* enter'd and made the Lease to the Plaintiff, who entred and was possessed, until the said *John Wyat* ousted him, (without conveying any Interest or Authority to the said *Wyat* under Sir *John Packington*) but the Jury concluded, *Et si super totam materiam, &c. præd' solutio præd' centum marcarum per præd'* Johannem Packington *Milit' præfat' Drugoni fact', sit bona & legalis solutio in lege earundem centum marcarum, secundum formam provisionis præd', Juratores prædicti ignorant: Et si, &c.* So that the Doubt which the Jury conceived, was only on the said Payment; and whether the said Payment, as is aforesaid, was sufficient in Law to give Title of Entry by Force of the said Condition to the said Sir *John Packington* on the said *Thomas Goodall*: And it was objected on the Defendant's Part, That although before the Payment it was agreed between the said Sir *John Packington* and the said *Drue Woodcliff*, that the said *Drue* should have but 32 *l.* of the said 100 Marks, yet Sir *John* paid the whole, and *Drue* received the whole, and the Property of all the Monies was in *Drue*; and if *Drue* would not have repaid him the Residue above 32 *l.* Sir *John* had not any Remedy, but an Action on the Case (if any Action on the Matter would lie.) And therefore they concluded that it was a good Payment to satisfy the said Condition.

But to that it was answered and resolved by *Popham* Chief Justice and the whole Court, that it was not any (*a*) Performance of the Condition, and their Reason was, because an Estate of Inheritance was by the Payment of the said Money to the Heir to be devested out of *Tho. Goodall* the Assignee of the Land; and therefore the Condition ought to be performed in Truth by a true and effectual Payment, and not by a Shadow or Colour of Payment: And in the Case at Bar the precedent Agreement guided the subsequent Payment, and their Intent was that, but the said 32 *l.* should be enjoyed and kept, although more was in Appearance paid; But the Estates of (*b*) third Persons shall not be devested by colourable or covenous Payments, but by true and effectual Payments, as is aforesaid. *Vide* 19 *H.* 6. 4. 20 *E.* 3. (*c*) *Accompt* 79. & 18 *E.* 4. 18. where it appears, That Conditions ought to be performed truly and effectually, *Quia factum non dicitur, quod non perseverat.*

(*a*) Co. Lit. 209. b. 2 Rol. Rep. 303, 403. Godb. 299. Moor 709. Jenk. Cent. 261. Lane 48. Cr. El. 383, 384. Cr. Jac. 451. Lit. Rep. 129. 130.

(*b*) Jenk. Cent. 261. Poph. 100. 8 Co. 133 a. 2 Rol. Rep. 303. Lane 48 Co. Lit. 209. b.

(*c*) Co. Lit. 129.

2. It.

2. It was reſolved, That if all the Money had been paid to the Heir (*a*) *bona fide* (altho *Robert Woodcliff* his Father hath conveyed over his whole Eſtate in the Land) it had been ſufficient. For the Heir is a Perſon expreſly named in the Condition to whom the Payment ſhall be made, and the Feoffor is a Stranger to the Conveyance that the Feoffee and his Aſſigns made, and the Feoffor ſhall not take Notice at his Peril of the Validity of them, nor of the Conditions or Limitations annexed to them.

(*a*) Co. Lit. 209. b. 210. a. Jenk. Cent. 261. 1 Rol. 421. Goldsb. 177, 178. Poph. 100. Hard. 11.

3. It was reſolved, That as this Condit. is in the Caſe at Bar, the Feoffor could not have paid it to *Goodall* (*b*) the Aſſignee of the Land, for Heirs, Executors, or Adminiſtrators were expreſſed in the Condition, and the Aſſignee not, as in the Caſe of *Litt. Lib.* 3. *cap. Condition* 78. If the Condition was, That if the Feoffor ſhall pay to the Feoffee, or to his Heirs, ſuch a Sum on ſuch a Day, there after the Death of the Feoffee, if he dies before the Day limited, the Payment ought to be made to the (*c*) Heir at the Day ſet, where this Word (ought) which imports Neceſſity in Law, was obſerved; And therefore in ſuch Caſe the Money ſhall not be paid to the Executors. And ſo the Doubt in 12 *E.* 3. *Condition* 9. and (*d*) *Dyer* 2 *Eliz.* 181. well reſolved: But (*e*) the Aſſignee of the Land, altho' he be not named in the Condition amongſt the Perſons who ſhall pay the Money, yet he may well pay the Money for the Saving of his Tenure, as *Litt.* (*f*) ſaith, *eodem Lib. fol.* 77. So note the Difference, that the Money ſhall not be paid to the Aſſignee of the Land without naming him in the Condition, for there the Payment goes to the Defeaſance of the Inheritance, but the Money ſhall be * paid by the Aſſignee in Salvation of his Inheritance. *Mich.* 23 & 24 *Eliz.* in the Court of Wards, the Caſe was ſuch, *Edw.* (*g*) *Randal* ſeiſed in Fee of certain Lands within the County of *Surry* by Deed indented and inrolled according to the Statute, did covenant with *John Brown*, that if the ſaid *Brown* did pay to the ſaid *Randal*, his Heirs or Aſſigns 400 *l.* the fourth Day of *March* then next following, at a certain Place, that then the ſaid *Edward* and his Heirs would ſtand ſeiſed of the ſaid Lands to the Uſe of *Brown* and his Heirs; and before the ſaid Day *Edw. Randal* died, and having Iſſue a Son, made his Will in Writing, and made *Alice* his Wife, *Ralph Hare*, and *Hugh Hare* his Executors, and deviſed the ſaid Land to his Wife during the Minority of his Son, and died, his Iſſue within Age, and in Ward to the Queen; and before the Day, the Wife renounced, and took Letters of Adminiſtration. And now the Queſtion was, to who the Money ſhould be paid. And in that Caſe three Points were reſolved by the Chief Juſtices *Wray* and *Dyer*, and the whole Court of Wards, that is to ſay, That in the ſaid Caſe theſe Words (Aſſigns) ſhall be only

(*b*) Jenk. Cent. 261. 1 Rol. 421. Cr. El. 384.

(*c*) Lit. ſect. 339. Co. Lit. 210. a

(*d*) Dyer 181. pl. 50. Owen 10.

(*e*) Hardr. 425. Co. Lit. 207. b.

(*f*) Lit. ſect. 336.

* Co. Lit. 207. b.

(*g*) Mo. 243, 705. Co. Lit. 210. a. Hard. 95. Palm. 482.

ly intended of the Assignees of the Estate of *Edw. Randal*, for he has an Estate in him assignable, and the Law will never seek out (*a*) an Assignee in Law, when there may be an Assignee in Fact: But if *Edward Randal* had made a Feoffm. in Fee, on Condition that the Feoffee should pay the Money to the Feoffor, his Heirs or Assigns, *&c.* there becauſe he departs with his whole Estate in Fee, and has but a bare Condition which he cannot assign over, the Law, which will never reject any Word, if by any reasonable Construction it may take Effect, will make Construction what Person will be most proper as his Assignee in Law to receive the said Money; and those the Law adjudges to be his (*b*) Executors, becauſe they represent the Person of the Testator for all Goods and Chattels, and in such Case the Feoffor cannot have any Assignee in Fact. And so a good Difference; and therewith agrees 27 (*c*) *H.* 8, 2. *a.* 2. It was resolved in the said Case of *Randal*, that the Wife having by the Devise but a particular Interest in the Land, was not Assignee of the Land within the said Proviso: So if the said *Edward* had made an Estate for Life or Years, *&c.* for none shall be Assignee in this Case: But when the Covenantor departs with his whole Estate, as if he makes a Feoffment in Fee, a Gift in Tail, or a Lease for Life with the Rem'r over in Fee, in such Case the Lessee for Life, or Donee in Tail is the Assignee: But so long as the Covenantor has the Reversion remaining in him, the Payment ought to be made to him. So it was said, that if *Edw. Randal* had made an Assignment of his whole Estate in Part, as long as any Part remained with *Edw. Randal*, the Tender ought to be made to him or his Heirs. 3. It was resolved in the said Case of *Randal*, That the Tender ought to be made to the (*d*) Heir, and not to the Executors, becauſe the Heir was expresly named, which excluded Executors and Administrators. *Et* (*e*) *expressum facit cessare tacitum.*

4. It was resolved, That although in the Case at Bar no Title was found for the Defendant, but he is as a meer Stranger, yet the Court in a special (*f*) Verdict, will never doubt but of that only whereof the Jurors have conceived a Doubt: And therefore forasmuch as they rely and conclude on the Payment, whether it be a good Performance of the Condition or not, the Court ought not to give Judgment till they have resolved that which the Jurors have referred to their Consideration, and all other Matters shall be intended and supplied, but only that which the Jurors have referred to the Consideration of the Court. And so it was adjudged *M.* 30 & 31 *in B. R.* between (*g*) *Scovel* and *Cabel*: And afterwards Judgment was given for *Cuthbert Goodall*

(*a*) Co. Lit. 210. a.

(*b*) Co. Lit. 209. a. b.

(*c*) Br. Condition 5. Br. Exposition 4. Br. Deputy 1.

(*d*) Lit. sect. 339. Co. Lit. 210. a.

(*e*) Godb. 449. Co. Lit. 210. a. 183. b. Latch. 265. Cart. 35. Palm. 497.

(*f*) Jenk. Cent. 262. Hob. 55. 262. Cr. Jac. 64, 437, 442. Cr. Car. 22, 392, 458. 2 Rol. 698. 702. Cr. El. 231, 239. Salk. 249.

(*g*) Moor 268.

the Plaintiff: On which Judgment the Defendant brough a Writ of Error in the Exchequer-Chamber: And all the Court on Argument and Debate of the Caſe there again did concur in Opinion with the Juſtices of the King's Bench and affirmed the Judgment. And ſo this Caſe was reſolved by all the Judges of *England*,

13 El. cap. 8.

Mich. 39 & 40 Eliz.

In the Common Pleas.

The Counteſs of Northumberland's *Caſe.*

(a) 2 And. 48, 49, 50, &c. Moor 455, 456. Cr. El. 518.

FItton and the Counteſs of *Northumberland* (a) his Wife, Sir *Thomas Cecil* Knight, and *Dorothy* his Wife, *William Cornwallis* Eſquire, and *Lucy* his Wife, and the Lady *Danvers*, Daughters and Heirs of the Lord *Latimer*, brought a *Quare Impedit* againſt *Hall* and others, who pleaded a a Releaſe of *William Cornwallis* pending the Writ; Judgment of the Writ; and thereupon the Plaintiffs demurr'd. And it was adjudged that it went in Bar (b) but againſt *William Cornwallis* and his Wife, and the Writ ſtood for the others: *Vide* 45 *E.* 3. 10. *a. in the Caſe of* (c) *Ward. Et nota*, That in all Caſes of a Thing intire, and in the Realty, as Preſentation to a Church, Wardſhip of the Body, &c. the Releaſe of one ſhall enure to the Benefit of the others. Then it was moved, That the Declaration was inſufficient for the Plaintiffs in their Declaration intitle themſelves, that the ſaid Lord *Latimer* was ſeiſed of the Advowſon in Fee, and granted the next Avoidance to Dean *Carew*, and afterwards the Church being void, Dean *Carew* preſented, and ſo convey the Deſcent to them without alledging any Preſentment in the Lord *Latimer* or any other but only in the Grantee of the next Avoidance; and whether this Preſentment was good Title for the Grantor, and his Heirs or not, was the Queſtion, And it was adjudged that it was a (d) ſufficient Title, for he doth it in the Right and

(b) Doct. pl. 64. 2 Rol. 411. Moor 456. Cr. El. 65, 518. 2 Co. 68. a.

(c) Moor. 456. Cr. El. 65. Fitz. Gard. 100. Br. Gard. 13. Br. Summons & Severance 5.

(d) Cr. El. 518. Antea 57. b. 2 Rol. 377, 378. 6 Co. 57. b. Moor 456. 2 And. 49, 50.

Title of the Grantor, and therefore it ſhall ſerve for him to make a Title in a *Quare Impedit.* The ſame Law of Leſſee for Years, Leſſee for Life, Tenant in Dower, Tenant by the Curteſy, Guardian, Tenant by Statute Merchant, Staple, *&c.* and this agrees with divers Opinions in 7 *E.* 4. 20. 22 *E.* 4. 9. *b.* 16 *H.* 7. 18. *a.* 9 *H.* 7. 23. *Br. Quare Impedit* 122. 23 *Eliz. Dyer* 300. And true it is that it is a common Learning in our Books, that where Tenant for Years, or for Life, brings a *Quare Impedit*, he ought to alledge Seiſin in him who has Fee, *& hoc regulariter verum eſt.* And yet Preſentations by themſelves ſuffice, as appears 8 *H.* 5. 10. And this Reſolution doth not oppoſe that Rule; for the Preſentation of the Grantee of the next Avoidance being made in the Title and Right of the Grantor ſhall ſerve as well for him, as his own Preſentment, and is tantamount. As if Grantee for Years of a Seigniory, or Guardian, get Seiſin of the Services, it ſhall be a good Seiſin for him in Reverſion, and therewith agrees *F. N. B.* 179. *f.* 45 *E.* 3. 26. 11 *E.* 3. *Aſſiſe* 86. Alſo it is held in our Books, That if Preſentment be alledged in the Leſſor or Donor, and alſo in the Leſſee and Donee it is not double, for the Preſentment of the Leſſor or Donor is only traverſable. And ſee for both theſe Points 18 *E.* 3. 15. 24 *E.* 3. 37. 40 *E.* 3. 10. 42 *E.* 3. 4. 33 *H.* 6. 32, 33, 34. 7 *E.* 4. 20. 9 *H.* 7. 23. 1 & 2 *Phil. & Ma. Dyer* 106. Note a Caſe adjudged in which was Diverſity of Opinions in our Books, in which the Law is now well reſolved.

Antea 57. b. 97. b. 6 Co. 57. b.

1 Rol. Rep. 255. 3 Bulſtr. 89. Cr. El. 518 Doct. pl. 146.

Mich. 40 & 41 Eliz.

In the Common Pleas.

BURY's *Caſe.*

Jenk. Cent. 268, 269. Moor 225, 226, 227, 228. Noy 72. 2 Leon. 169, 170, 171, 172, &c. Dyer 279. pl. 40. And. 185, 186.

BEtween *Webber* and *Bury* in an *Ejectione firmæ*, a ſpecial Verdict was given on a Divorce between *Bury* and his Wife, *cauſa frigiditatis*, and that the Wife for three Years after the Marriage *remanſit virgo intacta propter perpetuam impotentiam generationis in viro*, & *quod vir fuit inaptus ad generandum.* And in this ſpecial Verdict all the Examinations of the Witneſſes on which the Judge in the Spiritual Court was moved to give his Sentence, and which were diſpoſed in the ſame Caſe by which the perpetual Infirmity and Diſability of *Bury ad generandum* was manifeſt (which were not entered in a former Verdict, on which Judgment was given) by which it was pretended, that by Reaſon of his perpetual Impotency, the Iſſue which he had by the ſecond Wife was illegitimate; and that was the Doubt in this Cauſe which the Jury conceived: And it was adjudged, that the Iſſue by the ſecond Wife was legitimate; for it is clear that by the Divorce *cauſa frigiditatis* the Marriage was diſſolved *a vinculo matrimonii*, and by Conſequence each of them might marry again. Then admitting the ſecond Marriage was voidable, yet it remains a Marriage until it be diſſolved; and by Conſequence the Iſſue which is had during the Coverture, if no Divorce be in the Life of the Parties, is lawful. See 36 *Aſſ.* 10. 39 *E.* 3. 32. 28 *H.* 8. *Baſtardy* 44. *Bracton, lib.* 2. *fol.* 92. 12 *H.* 7. 22. 22 *E.* 4. *Conſultation* 5. *Et ſemper præſumit pro legitimatione puerorum, & filiatio non poteſt probari*, and a Man may be *habilis & inhabilis diverſis temporibus*, And therefore (notwithſtanding the Depoſitions by which a natural and perpetual Inability before the firſt Sentence was diſpoſed) Judgment was given that the Iſſue was lawful according to the firſt Judgment given. And on this Judgment a Writ of Error was brought, and after many Arguments and great Deliberation, the ſaid Judgment was affirmed by *Popham* Chief Juſtice and the whole Court, for the Reaſons and Cauſes aforeſaid.

Jenk. Cent. 268, 269.

Moor 228.

3 Bulſt. 42. 2 Co. 44. b.

Mich.

Mich. 40 & 41 Eliz.

In the King's Bench.

FLOWER'S *Case.*

Lancelot Flower was indicted on the Statute of 5 *Eliz.* for Perjury in giving falſe Evidence to the Grand Inqueſt at the Seſſions held at *Wisbich*, &c. on an Indictment of Riot, and the Indictment was removed into the King's Bench and the ſaid *Flower* was by Judgment of the Court diſcharged of the Indictment; for the Statute of 5 *Eliz. cap.* 14. has two Branches: The firſt is againſt Procurers of Perjury, and that in Matter depending in Suit by Bill, Writ, Action, or Information; ſo that a Procurement of Perjury on an Indictment is out of that Branch. The ſecond Branch (on which the ſaid *Flower* was indicted) is enacted againſt them who commit Perjury *by his or their Depoſition in any of the Courts above mentioned, or being examined in perpetuam rei memoriam*: And altho' this Clauſe be general and not reſtrained by any Words to ſuch particular Suits, *viz.* by Bill, Writ, Action, or Information, as the firſt was, yet in good Conſtruction this Branch ſhall have Reference to the firſt, and ſhall be expounded by it, and ſo one Part of the Act ſhall (*a*) expound the other. For otherwiſe the Party who commits the Perjury on an Indictment will be puniſhed by this Branch; and he who ſuborns and procures him to commit the Perjury will paſs with Impunity, which will be againſt Reaſon, and the Meaning of the Makers of the Act. For ſome ſay, *Quod plus peccat author quam actor.* And ſo it was adjudged in *Monday*'s Caſe in the K's Bench, *Mich.* 36 & 37 *Eliz.* And the like Judgm. was given *Trin.* 39 *Eliz.* in the King's Bench in Caſe of Perjury ſuppoſed to be committed on an Indictment of Felony.

3 Inſt. 164. 5 El. cap. 9. 2 Rol. Rep. 175. 3 Leon. 201. Goldsb. 51.

3 Inſt. 164. Cr. Jac. 120, 212.

(*a*) Co. Lit. 381. a. 2 Co. 55. a. 3 Co. 59. b. 8 Co. 117. a. Godb. 324, 428. 2 Rol. Rep. 356.

Hill. 40 Eliz.

In the Common Pleas.

ROOKE's *Case.*

4 Inſt. 275. Hardr. 478. Palm. 331.

IN Replevin in the Common Pleas by *Rooke* againſt *Withers*; the Defendant juſtified the Taking by Authority of a Commiſſion of Sewers directed to *B. S.* and others, to ſurvey all Walls (*prout* in the Commiſſion) in the River of *Thames* in the Counties of *Kent* and *Eſſex*, becauſe one *Carter*, &c. was aſſeſſed to every Acre for Repairing of a Bank, &c. for the Non-payment of which he took the Diſtreſs; to which the Plaintiff replied, Of his Wrong, without ſuch Cauſe. And the Jurors found the Commiſſ. and the Stat. of *6 H. 6. c. 5.* & *23 (a) H. 8. c. 5.* And that the Commiſſion. did impanel a Jury to inquire of Defaults, who preſented that ſeven Acres of Meadow in which the Diſtreſs was taken was next adjoining to the River; and that the Bank of the River was adjoining to the ſaid ſeven Acres, for which they taxed *Carter* to pay 8 *s.* for every Acre: And the Jury further found, that the Occupiers of the ſaid ſeven Acres (*b*) had uſed always to repair the ſaid Bank, ſometimes voluntarily, and ſometimes by Preſentment. And further that divers other Perſons had Lands to the Quantity of 800 Acres within the ſame Level, and ſubject to Drowning, if the ſaid Bank be not repaired: And whether this Aſſeſſment of the Owner of the Land next adjoining only, without any Aſſeſſment of the others, who had Lands ſubject to the like Danger of Drowning, was lawful or not, was the Queſtion. And in this Caſe three Points were reſolved:

(a) 10 Co. 138. a. 139 a. 140. a. 13 Co. 36. Cr. Jac. 336. 2 Bulſt. 197. Callis Sect. f. 1.

(b) 2 Rol. Rep. 289.

1. That the Finding of the Repairing, &c. by the Occupiers of the ſaid ſeven Acres was not material, becauſe the (*c*) Occupiers might be Tenants at Will, or other particular Tenants, who can't by their Act bind him who has the Inheritance.

(c) 2 Rol. Rep. 289.

2. That the Commiſſioners ought to tax (*e*) all who are in Danger of being damaged by the not Repairing equally, and not him who has the Land next adjoining to the River only; for the Statute of *6 H. 6. cap. 5.* in which

(d) 10 Co. 139. a. 1 Rol. Rep. 32. 2 Bulſtr. 199. Cr. Jac. 336.

the

the Commiſſion of Sewers is formed and ſpecified, has preciſe Words in the ſame Commiſſion, That no Perſon of any Eſtate or Condition ſhall be ſpared. *Ita quod aliquibus tenentibus terrarum ſive tenementorum, &c. diviti vel pauperi, vel alteri cujuſcunque conditionis, ſtatus, vel dignitat' fuerit, qui defenſionem, commodum, & ſalvationem per præd' Wallias, foſſata, gutteras, pontes, calceta, & gurgites, &c. habent vel habere poterint nullatenus parcatur in hac parte.* And if the Law ſhould be otherwiſe, Inconvenience might follow, for perhaps the Rage and Force of the Water might be ſo great, that the Value of the Land adjoining will not ſerve to make the Banks, *&c.* and therefore the Statutes will have all who are in Danger, and who are to receive Benefit by the Making of the Banks to be contributory; for (*b*) *Qui ſentit commodum ſentire debet & onus:* And the ſaid Statutes require Equality, which well agrees with the Rule of Equity: *Vide* the Caſe of Bankrupts in the ſecond Part of my *Reports*. *Et vide* 35 *H.* 8. *Br.* Tit. *Teſtam.* (*c*) 19. 4 *E.* 3. **Aſſiſe* 198. †11 *H.* 7. 12. *b.* ¶ 29 *E.* 3. 39. and Sir *William* (*d*) *Harbert*'s Caſe in the third Part of my Reports; Caſes of Equality grounded on Reaſon and Equity, *Ipſæ* (*e*) *etenim leges cupiunt ut jure regantur*; and notwithſtanding the Words of the Commiſſion give Authority to the Commiſſioners to do according to their Diſcretions, yet their Proceedings ought to be limited and bound with the Rule of Reaſon and Law. For (*e*) Diſcretion is a Science or Underſtanding to diſcern between Falſity and Truth, between Wrong and Right, between Shadows and Subſtance, between Equity and colourable Gloſſes and Pretences, and not to do according to their Wills and private Affections; for as one ſaith, *Talis diſcretio diſcretionem confundit.* And *Walmeſley* Juſt. held, and it was not denied by any, That if the Owner of the Land was bound by (*f*) Preſcription to repair the River-Bank, that yet on ſuch Commiſſion awarded, the Commiſſioners ought not to charge him only with the Whole, but ought to tax all who had Land in Danger: And to this Purpoſe the Statutes were made; for otherwiſe it might be that all the Land would be drowned before that one Perſon only could repair the Bank, and that appears by the Words of the Statutes; wherefore Judgment was given for the Plaintiff.

Cr. Jac. 336. 10 Co. 139. a. 1 Rol. Rep. 32. 2 Bulſt. 199.

(*b*) 1 Co. 99. a. 5 Co. 24. b. 7 Co. 38. b. Co. Lit. 231. a. 2 Inſt. 489. Carr. 142. 3 Keb. 592.

(*c*) 2 Co. 23. b. Br. N. C. 275. 2 Bulſt. 15.

* 2 Co. 25. b.

† 2 Co. 25. b. 3 Co. 13. a. 14. a. Co. Lit. 376. b. 386. b. Hob. 25. 3 Bulſtr. 318. Cr. Jac. 218.

¶ 2 Co. 25. b.

(*d*) 3 Co. 13, 14.

(*e*) 10 Co. 138. a. 140. a. 4 Inſt. 41. 2 Bulſtr. 197, 198. Callis Sect. 112. Hob. 158. Hardr. 146. Cr. Jac. 336. 3 Bulſt. 128.

(*e*) 2 Co. 25. b. 8 Co. 152. a. 9 Co. 122. b. Co. Lit. 10. a. 43. a. 166. b. 274. b. 171. b.

(*f*) 10 Co. 140. a. Callis Sect. 144.

(*g*) 10 Co. 140. b.

Trin. 40 Eliz.

In the Common Pleas.

PENRUDDOCK's *Case.*

Hill. 37 Eliz. Rot. 387. in the King's Bench on a Writ of Error. Jenk. Cent. 260. 3 Inſt. 201, 202, 203, &c. Cr. El. 234. 9 Co. 53. b.

IN a *quod permittat* between *Henry Clark* Plaintiff, and *Edward Penruddock* and *Mary* his Wife Defendants, which was adjudged in the Common Pleas, and removed by a Writ of Error into the King's Bench, *Hill.* 37 *El. Rot.* 387. the Caſe was ſuch; *John Cock* 2 *Oct. anno* 1 *Mar.* built on his own Freehold an Houſe in *St. John's Street* in the County of *Midd'* ſo near the Curtilage of the Houſe of *Thomas Chichely*, that *domus illa ſuperpendet*, *Anglice*, doth hang over *magnam partem*, *videlicet* 3 *pedes Curtilagii præd'*, &c. And afterwards *John Cock* conveyed the Houſe which he had ſo built to *Penruddock* and his Wife; and *Thomas Chicheley* to whom the Nuſance was done, conveyed his Houſe to the ſaid *Clark* the now Plaintiff. And the Plaintiff in his *Quod permittat* (which he brought) *proſternere domum prædict'*, declared that the ſame Houſe *ſuperpendet tres pedes curtilagii prædict'*, *ſic quod aquæ pluviales de eadem domo deſcendentes*, *ſolum ejuſdem curtilagii conterunt*, *ac magnopere*, *ac indies magis magiſque conſumunt & devaſtant*, *ac ea ratione curtilag' præd' quolibet pluviali tempore humectat' & inundat' exiſt'*, *quod prædict'* Henric *inhabit' in eodem meſſuagio*, *nullum profic' & eaſiament' de eodem curtilagio percipere poſſit*, *ad nocumentum liberi tent' prædicti in eiſdem.* And the firſt Queſtion was, if the Writ of *Quod permittat* lies in this Caſe for the Feoffee or not: And it was objected, that when a Wrong and Injury is done by levying of a Nuſance for which an Action lies, that if he who has the Freehold to which the Nuſance is done conveys it over, now this Wrong is remedileſs; as if the Lord incroaches Rent of his Ten't, the Tenant cannot avoid this Wrong in an (*a*) Avowry, but in an *Aſſiſe*, (*b*) or a *Ceſſavit*, or a *Ne* (*c*) *injuſte vexes*, he may. But if the Ten't to whom the Wrong is done enfeoffs another, his Feoffee ſhall never avoid this

(*a*) 4 Co. 11. b. 9 Co. 34. a. Doct. pl. 318. 2 Inſt. 21.
(*b*) 4 Co. 11. b. 9 Co. 34. a. Doct. pl. 318. 2 Inſt. 21.
(*c*) F.N.B. 11. c.

this Wrong; for he ſhall take the Land in the ſame Plight as it was given him, and that appears by 33 *E.* 3. *Avowry* 255. & 18 *E.* 2. *Avow.* 217. & 4 *E.* 2. *Avow.* 201. Alſo if a Man be ſeiſed of Land to which Common is appendant, and he is diſſeiſed of the Common, upon which he brings an Aſſiſe, and afterwards enfeoffs another of the ſaid Land, the Common is extinct for ever; and therewith agrees 4 *E.* 3. wherefore they conceived that the Feoffee ſhould not have the ſaid *Qd' permittat* to avoid the Wrong and Nuſance made in the Time of his Feoffor. But it was anſwered and reſolved, That the dropping of the Water in the Time of the Feoffee is a new Wrong, ſo that the Permiſſion of the Wrong by the Feoffor, or his Feoffee, to continue to the Prejudice of another ſhould be puniſhed by the Feoffee of the Houſe to which, &c. And if it be not reformed after Requeſt made, the *Qd' permittat* lies againſt the (*a*) Feoffee, and he ſhall recover Damages, if he do not reform it, but without Requeſt made, it doth not lie againſt the Feoffee, but againſt him who did the Wrong it lies without any Requeſt made, for the Law doth not require any (*b*) Requeſt to be made to him who doth the Wrong himſelf: And ſo this Caſe is not like any of the Caſes which have been put on the other Side. *Vide* 4 *Aſſ.* 3. (*c*) 4 *E.* 3. 36. *a. b.* 5 *E.* 3. 43. where it appears that the Feoffee ſhall have a *Quod permittat* of a Nuſance levied in the Time of the Feoffor: And with this Judgm. agrees a Judgm. given by Sir *Chriſt. Wray* Ch. Juſt. and the whole Court of *King's Bench*, *Mich.* 24 & 25 *Eliz.* where the Caſe was; *John* (*d*) *Rolf* the Father was ſeiſed of a Houſe in *Hemelhumſtead* in Fee; and *Ric. Rolf* the Father was alſo ſeiſed of a Piece of Land on the South and Eaſt Parts adjacent to the ſaid Houſe, and *Ric. Rolf* built a Houſe on his Piece of Land aforeſaid, ſo near the Houſe of the ſaid *John Rolf*, that the Eaves of the ſaid Houſe did hang over Part of the Houſe of the ſaid *John Rolf*, ſo that the Rain which deſcended from the ſaid Houſe of the ſaid *Ric. Rolf* fell on Part of the Houſe of the ſaid *J. Rolf*, and afterwards *J. Rolf* died, and his Houſe deſcended to his Son, and afterw. the ſaid *Rich.* died, and his Land deſcended to his Son, who on Requeſt made by the ſaid *John* the Son, did not reform the ſaid Wrong, but ſuffered the Eaves of his Houſe to hang over the Houſe of *John Rolf* the Son for a certain Time; the Wall of the Houſe of the ſaid *J. Rolf* the Son became rotten, &c. upon which Matter *John* the Son brought an Action againſt *Rich.* the Son, upon which *Rich.* the Son did demur in Law; and it was adjudged that the Action was (*e*) maintainable, becauſe the Def. on Requeſt made, did not reform the Nuſance which his Fath. made, but ſuffered it to continue to the Prejudice and Damage of the Pl. Son and Heir to him to whom the Wrong was done. *Vide* 7 *H.* 4. 13. 3 *E.* 3. *Voucher* 272. 20 *Aſſ. p.* 18. 19 *Aſſ. p.* 6. And with this Judgment in the principal Caſe agrees the *Regiſter* 199. *b.* & *F. N. B.* 124. *H.* And the Stat. of *Weſt.* 2. cap. (*f*) 24. by which it is enacted, *Quod ſi transferat' domus, murus,*

(*a*) Jenk. Cent. 260. Raym. 424, 469. 2 Bulſt. 16. 2 Inſt. 405. 3 Inſt. 204. Cr. Jac. 231, 373. Cr. El. 191. Moor 353. F. N. B. 124. h.

(*b*) Cr. El. 269.

(*c*) 2 Bulſtr. 16. 9 Co. 54. a.

(*d*) Rolf's Caſe, 24 & 25 Eliz. Cr. Eliz. 402. Moor 353.

(*e*) Moor 118, 353. Cr. El. 191, 402. Cr. Jac. 231.

(*f*) 9 Co. 55. a 2 Inſt. 405, &c. Co. Lit. 54. b.

murus, &c. in aliam perſonam, breve non denegat', ſed de cætero, cum in uno caſu concedit' breve, in conſimili caſu ſimili remedio indigente, ſicut prius, fiat breve. Et ſi hujuſmodi levata ad nocumentum transferant' in aliam perſonam, de cæterô fiat breve. By which it appears, That the Writ in our Caſe well lies, and ſo it was adjudged in the *Common Pleas*, that the *Quod permittat* in the Caſe at Bar did well lie. *Vide* 14 *Eliz. Dyer (a)* 319. Madam *Brown's* Caſe. And *Hill.* 35 *Eliz. Rot.* 493. between (*b*) *Beſwick* and *Cumden* in the *King's Bench*: On which Judgment in the Caſe at Bar *Penruddock* and his Wife brought a Writ of Error in the *King's Bench*, where *Popham* Chief Juſtice, and all the Juſtices of the *King's Bench* did concur in Opinion with the Juſtices of the *Common Pleas*, as to the Point there adjudged: And it was moved in the *King's Bench*, If the Feoffee might abate the Nuſance as the Feoffor himſelf, and as well in the Hands of the Feoffee who did not the Nuſance, as in the Hands of the Tort-Feſor himſelf; and if the Feoffee of the Houſe to which the Nuſance was made might do it, (if he might do it) before he had ſome ſpecial Prejudice, as in the dropping of the Water, or if he ought to ſtay till he had ſpecial Prejudice. And *Popham* Ch. Juſt. held that in both Caſes, the Feoffee might (*c*) abate the Nuſance, and that before any Prejudice, for it is reaſonable that he ſhould prevent his Prejudice, and not ſtay till it be done, which was granted by the whole Court. And afterwards the Judgment was affirmed: And ſo this Caſe was adjudged by all the Judges of *England*.

(*a*) Cr. El. 251, 402
2 Leon. 103.
Dyer 319, 320. pl. 17.
Yelv. 144.
Noy 112.
(*b*) Moor 353, 449. 450.
Cr. El. 402, 403.
Noy 68.
(*c*) 9 Co. 55. a.
Cr. El. 26).
1 Rol. Rep. 394.
3 Bulſt. 197.
1 Jones 222.
2 Rol. 144, 145, 565.
Cr. Jac. 555.
9 E. 4. 35. b.
Cr. Car. 185.
Jenk. Cent. 260.

Paſch.

Paſch. 41 Eliz. *Rot.* 513.

WINDSOR's *Caſe.*

IN a *Quare Impedit* by *A. Windſor* againſt the Archbiſhop of *Canterbury*, *Fletcher*, &c. for the Church of *Buſcot* in the County of *Berks*: The Plaintiff declared that he had a Manor to which the Advowſon of two Parts of the Church was appendant, and that the Defendant had a Manor to which the Advowſon of the third Part was appendant; and on the Declaration, and the Bar, the Caſe was ſuch: The Plaintiff had the Advowſon of two Parts, and the Defendant of the third; the Plaintiff preſented once, and the Incumbent died, and afterwards he preſented in the Time of *E. 6. Parry* who was admitted, inſtituted, and inducted; And afterwards in the Time of Queen *Mary* he was deprived, becauſe he *fuit conjugatus, and a Favourer of the Religion tempore Ed. 6.* and the Church being void by his Deprivation, the Defendant preſented his Clerk, who was admitted, inſtituted, and inducted, *& remanſit in Eccleſia uſque* 1 *Eliz.* and then deprived by *Jewel* and others of the High Commiſſioners, and the firſt Sentence declared and adjudged to be void, and *Parry* the firſt Incumbent reſtored to the ſaid Church: And afterwards the Defendant's Clerk ſo deprived died, and then *Parry* died, and the Defendant preſented as in his Turn, foraſmuch as his Incumbent was deprived, and *Parry* the Incumbent of the Plaintiff reſtored, by whoſe Death the Church now becomes void; upon which the Pl. did demur in Law: And it was adjudged againſt the Pl. And in this Caſe it was agreed, If two have Title to preſent by Turns; and one preſents, who is admitted, inſtituted, &c. and afterwards is deprived for Crime or Hereſy, or any other Cauſe, yet he ſhall not preſent again, but it ſhall ſerve for his (*a*) Turn; So if he preſents a meer Lay-man, who was admitted, inſtituted &c. altho' it be declared by Sentence that he was uncapable, and therefore void *ab initio*; yet becauſe the Church was full till the Sentence declaratory came, therefore, altho' this Deprivation relates to ſome Purpoſe, yet it ſhall ſerve for his Turn, becauſe it was but voidable, as in the Caſe of *Litt.* If the (*c*) Lord marries his Ward within Age of Conſent, and afterwards he diſagrees to it, now it is no Marriage *ab initio*, yet he

Co. Ent. 485. pl. 6. Moor 558, 559. 2 Rol 347. Cr. Cl. 686, 687. 10 Co. 136. b. 2 Rol. Rep. 131. Lit. Rep. 304.

(*a*) 2 Rol. 347. Cr. El. 687. 811. Hob. 167.

(*b*) 2 Rol. 347. Hob. 148, 149.

(*c*) Co. Lit. 79. b. Lit. ſect. 105.

(a) Co. Lit. 79. b. Co. Lit. sect. 105.

he shall not *(a)* marry him afterwards. So 27 *H.* 6. *Gard.* 118. If the Guardian marries his Ward, and afterwards they are divorced *causa præcontractus*, yet he shall not have the Marriage of him again. But when the Admission and Institution are meerly void, then without Doubt it shall not serve for a Turn, as if his Presentee had been admitted, instituted, and inducted, but he had not subscribed to the (*b*) Articles, *&c.* according to the Statute of 13 *Eliz.* whereby in such Case the Admission and Institution and Induction are void; 23 *Eliz.* (*c*) *Dyer pl. ult.* But in the principal Case, although the Defendant's Clerk was Parson for the Time to all Purposes, and during the first Deprivation *Parry* was not Incumbent; yet when the second Sentence came, then *Parry* was Incumbent again by Force of his former Presentation, Institution and Induction, and needed no new Institution, *&c.* And by Force of the second Sentence the Presentee of the Defendant was removed, and *Parry* restored; Then when *Parry* died, who was the last Presentee of the Plaintiff, the Defendant shall present as in his Turn, for the Presentation which he made now on the Matter, during the Life of *Parry*, being the second Presentee of the Plaintiff, cannot be in his Turn, when *Parry* died Incumbent by Force of the Plaintiff's Presentation: But if *Parry* had died (*c*) before the second Sentence, or had not reversed the former Sentence, then the Defendant had had his Turn: And note, that the Writ was *ad* (*d*) *Ecclesiam*, and the Declaration was *de advocatione duarum partium*, and well. *Vide Dyer* 6 *E.* 6. (*e*) 78. *b. F. N. B.* 39. *b. Vide Trin.* 14 *Eliz. Rot.* 1060. in the *Common Pleas*, and *Hill.* 38 *Eliz.* Sir *Thomas Stanhop*'s Case in the *Common Pleas*: And I conceive that the Writ ought to be (*f*) general, as *F. N. B.* and divers other Books are; but the Declaration ought to be according to his Title.

Vide 23 Eliz. Dyer pl. ult.

(b) 2 Rol. Rep. 3. 2 Rol. 347. 6 Co. 29. a. 2 Jones 19. Cr. El. 680. 1 And. 62, 63. Yelv. 7. Cawley 22.

(c) Dyer 377. pl. 31. 2 Anders. 183. Hob. 168. Cr. El. 680.

(c) 2 Rol. 347. Cr. El. 687.

(d) Doctrin. pl. 95, 385. 10 Co. 135, 136. Co. Lit. 17. b. 18. a.

(e) Dyer 78. pl. 34. 4 Co. 75. a. b. 10 Co. 136. b.

(f) F. N. B. 33. a.

Trin.

Trin. 43 Eliz. *Rot.* 1084.

IN THE

COMMON PLEAS,

HUNGATE's *Case.*

Hungate (a) brought an Action of Debt on a Bond againſt *Meſe* and *Smith*, the Condition of which was to perform the Arbitrement of two, between the Plaintiff of the one Part, and the Defendants of the other Part; *ita quod arbitrium præd' fiat & deliberetur utrique partium prædictorum* before ſuch a Day: And the Defendants pleaded that before the Day the Arbitrement was made, but was delivered to the Plaintiff, and *Meſe* one of the Defendants, and not to the ſaid *Smith*; upon which the Plaintiff demurr'd. And Judgment was given againſt the Plaintiff. And it was reſolved, that ſometimes this Word *(uterque)* is *diſcretive* and ſeveral, and ſometimes *collective*, and conjoined: As if two or three be bound in a Bond, *(b) & utrumque eorum*, this Word *utrumque* makes the Bond ſeveral, as it is held in 28 *(c) H.* 8. *Dy.* 19. *b.* But in the Caſe at Bar it ſhall be taken *collective*. And the Rule to know in what Senſe it ſhall be taken, and when it ſhall be taken either *(d)* ſeverally or * jointly is to conſider the ſubject Matter, and to make Conſtruction according to Congruity of Reaſon, and *ut evitetur abſurdum*, as in the Caſe of *(e)* 39 *H.* 6. 7. the Condition of a Bond was, *ſi uterque eorum, ſcil.* the Obligor and Obligee, *ſteterit arbitrio* Robert' Bozom, *&c.* and it was adjudged that each of them was bound *pro parte ſua*, and not one for the other; for that would be abſurd and unreaſonable. And in the Caſe at Bar, foraſmuch as each of the Parties is ſubject to Penalty and Danger, it is Reaſon that the Arbitrem. ſhould be delivered

(a) Moor 642. Cr. El. 885. 2 Rol. Rep. 87. Bridg. 63, 64. March Arbitrement 182, 183.

(b) 2 Rol. 148. 2 Bulſtr. 70. Cr. Jac. 322. 10 H. 7. 16. Dy. 310. pl. 80.

(c) Dyer 19. pl. 114. 2 Bulſtr. 70.

(d) Cr. El. 797. * Moor 260.

(e) Bridg. 63, 64. 39 H. 6. 11. a. 10. b.

to

to each of the Parties, to the Intent that they might perform it, and avoid the Danger of Breaking of it. 2. It was resolved, that if two be of one Part, and two of the other Part, and the Words are (as above) *ita qd' deliberet' utriq; partium*, that the Delivery of the Arbitrement to one of the one Part, and to another of the other Part is not sufficient; for Party is to be intended of the whole Party, and one is as well within the Penalty and Danger as the other. And forasmuch as the Arbitrement was not delivered to the said *Smith*, Judgment was given against the Plaintiff.

Trin. 42 Eliz.

In the King's Bench.

BAKER's *Case.*

UPon Evidence in an *Eject. firmæ*, between *(a) Middleton* and *Baker*, it was resolved by the whole Court, That if the Plaintiff in Evidence (*b*) shews any Matter in Writing, or of Record, or any Sentence in the Eccleſiaſtical Court, upon which a Queſtion in Law ariſes, and the Defendant offers to demur in Law upon it, the Plaintiff cannot refuſe to join in Demurrer, (*c*) but he ought to join in the Demurrer, or wave his Evidence. So if the Plaintiff produces (*d*) Witneſſes to prove any Matter in Fact, upon which a Queſtion in Law ariſes if the Defendant admits their Teſtimony to be true, there alſo the Defendant may demur in Law upon it, but then he ought to admit the Evidence given by the Plaintiff to be true; and the Reaſon thereof is, That Matter in Law ſhall not be put to Lay-men. So may the Plaintiff demur upon the Defendant's Evidence, *mutatis mutandis*: But if Evidence be given for the (*e*) King in an Information, or any other Suit, and the Defendant offers to demur upon it, the King's Counſel ſhall not be compelled to join in Demurrer, but in ſuch Caſe the (*f*) Court ought to direct the Jury to find the ſpecial Matter, and upon that they ſhall adjudge the Law, as it appears 34 *H.* 8. (*g*) *Dyer* 53. but that is by (*h*) the King's Prerogative, who alſo may wave (*i*) a Demurrer, and take Iſſue at his Pleaſure. *Nota bene.*

(*a*) Cr. El. 751, 752.
(*b*) Co. Lit. 72. a. Doct. pl. 118.
(*c*) Co. Lit. 72. a. 2 Rol. Rep. 119. Doct. pl. 118.
(*d*) Doct pl. 118.
(*e*) Cr. El. 752. Co. Lit. 72. a. Doct. pl. 119.
(*f*) Cr. El. 752. Doct. pl. 119. Co. Lit. 72. a.
(*g*) Cr. El. 752. Co. Lit. 72. a. Dyer 53. pl. 8.
(*h*) 1 Mod. Rep. 280.
(*i*) Hard. 83. Plowd. 85. a. 236. a.

Mich.

Mich. 39 & 40 Eliz.

In the Common Pleas.

BOULSTON's *Case.*

BEtween *Boulston* and *Hardy* it was adjudged in the *Com. Pleas*, That if a Man makes (*a*) Cony-boroughs in his own Land, which increaſe in ſo great Number that they deſtroy his Neighbours Land next adjoining, that his Neighbour cannot have an Action on the Caſe againſt him who makes the ſaid Cony-boroughs; for ſo ſoon as the Conies come in his Neighbour's Land he may (*b*) kill them, for they are *feræ naturæ*, and he who makes the Cony-boroughs has no Property (*c*) in them, and he ſhall not be puniſhed for the Damage which the Conies do wherein he has no Property, and which the other may lawfully kill. And it was reſolved in this Caſe, That none may new erect a (*d*) Dove-cote but the Lord of a Manor, and if any do it, he may be puniſhed in the Leet, but no Action on the Caſe lies by any particular Man, for the (*e*) Infiniteneſs of Actions that may be brought: And of ſuch Opinion, as to the new Erection of a Dove-cote was Sir *Roger Manwood* Chief Baron, and the Barons of the Exchequer in the Exchequer-Chamber.

(*a*) Cr. El. 547, 548. Moor 420, 421, 453. 1 Rol. 90, 405. 1 Jones 356. Yelv. 104. 2 Leon. 201. 4 Leon. 7. Godb. 121, 123. Owen 114. 2 Bulſt. 115, 116.

(*b*) 1 Rol. 90. 4 Leon. 7. Cr. El. 548. Cr. Car. 388.

(*c*) 4 Inſt. 305.

(*d*) Moor 238, 421, 453. Cr. El. 548. 2 Rol. 138, 139, 265. Cr. Jac. 382, 491. Godb. 259. 1 Rol. Rep. 136. 200, 201. 2 Rol. Rep. 3, 4, 5, 30, 31, 32. Poph. 141.

(*e*) Cr. Car. 388. Antea 73. a.

Hill

Hill 43 Eliz. *Rot.* 1807.

In the Common Pleas.

ALDEN'S *Case.*

IN *Ejectione firmæ* by *Smith* againſt *Alden*; (*a*), the Defendant pleaded that the Tenements in which &c. were Parcel of the Manor of *Odiham* in the County of *Southampton*, &c. *quod quidem manerium eſt de antiquo dominico*, &c. and demanded Judgm. if this Court would take Conuſance; upon which the Pl. did demur in Law: And it was objected that this Action was but in the Nature of Treſpaſs, and that in old Time, in it the Term was not recovered, but only againſt him in the Reverſion; and in *b)* Treſpaſs for Breaking of a Cloſe and Felling of Trees, ancient Demeſne is no Plea, as it is adjudged in 46 *E.* 3. 1. *b.* Alſo Lands in ancient Demeſne ſhall be *c)* extended by *Elegit*, becauſe the Freehold doth remain as it was before, and yet the Intereſt of the Land is charged by this Execution, 7 *H.* 7. 1. But it was anſwered and reſolved that the Plea was good.

1. Becauſe the common Intendment is, that the Title and Right of the Land will come in Debate, as in a Replevin, in a Writ (*e*) of Meſne, in a Writ of (*f*) Ward, in Accompt (*g*) againſt Guardian in Socage, ancient Demeſne is a good Plea, for the Appearance and common Intendment that the Realty will come in Debate, 21 *E.* 3. 10 40 *E.* 3. 4. 46 *E.* 3. 1. So in Accompt againſt a Baily, for it is brought for the Iſſues and Profits of the Land, which is ancient Demeſne, which ought to be determined in the Court of ancient Demeſne. *Vide* 21 *E.* 4. *Ancient Demeſne* 6.

2. In this Action of *Ejectione firmæ*, the Plaintiff ſhall recover the Poſſeſſion of the Land, and ſhall have Execution alſo *per habere facias poſſeſſionem*, and not like an Execution by *Elegit*; for there no Judg-

(*a*) 2 And. 178. Cr. El. 826. (*b*) Cr El. 826. Hob. 47. 1 Rol. 322. Doct. pl 52. Br. ancient Demeſne 7. 4 Inſt. 270. (*c*) Hob. 47, 48. Dyer 373. pl. 13. Doct. pl. 51. 2 Inſt. 397. 4 Inſt. 270. Palm. 541. Br. ancient Demeſne 33. 22 Aſſ. pl. 45. Poſtea 105. b. 1 Ro. 888. * 2 And. 178. Cr. El. 826. Cr. Jac. 559. Hob. 47. 9 Co. 77 b. Doct. pl. 51 Latch 83, 84. 2 Brow. l. 129, 130, 133. 2 Rol. Rep. 181. Cr. Cir. 9. Palm. 406. 1 Bulſt. 108. 4 Inſt. 270. (*d*) Cr. El. 826. Hob. 47. 1 Rol. 322. 1 Bulſt. 108. 46 E. 3. 1. b. 2. a. Br. ancient Demeſne 47. 4 Inſt. 270. (*e*) 1 Rol. 322. Demeſne 7.

(*f*) Hob. 47. 1 Rol. 322. 55 E. 3. 1. b. 2. a. Br. ancient Inſt. 270. (*g*) Hob. 47. 2 Brownl. 131. 1 Rol. 322. 46 E. 3, 2. a. 4 Inſt. 270.

ment is given to recover the Poſſeſſion of the Land in a Court of Record, but only Execution done by the Sheriff in the Country: But in an Aſſiſe brought by Tenant by *Elegit* (*a*) ancient Demeſne is a good Plea, as it is held 22 *Aſſ.* 45. And there ſome ſay, That Land in ancient Demeſne is not ſubject to *Elegit*, but the Contrary is at this Day held for Law for the Reaſon aforeſaid. And where any Intereſt in the Land ſhall be bound, or the Realty come in Debate, it will be reaſonable that thoſe in ancient Demeſne, who beſt know to try and determine it, ſhould have the Conuſance of it. And if this Action proceeds in this Court, the Sheriff cannot return any Perſons within ancient Demeſne; and if he returns any, they may be challenged and withdrawn, and thereby the true Inſtitution of the Law will be defeated, *ſcil.* That the Intereſt of every Land ſhall be tried *per probos & legales homines de vicinet'*, *&c.* who beſt know the Truth of the Matter. And foraſmuch as at this Day all Titles of Lands are for the greateſt Part tried in Actions of Ejectments, if in them ancient Demeſne ſhould not be a good Plea, the ancient Privileges (which the Law for the Repoſe and Quiet of thoſe of ancient Demeſne allowed to them, to the Intent that they ſhould apply themſelves to Tillage and Husbandry, and therefore are ſo greatly regarded and favoured in our Books) would be utterly taken away and defeated. *Vide* 44 *E.* 3. 22.

(*a*) Hob. 47, 48. Antea 105. a. Dy. 373. pl. 13. Doct. pl. 51. 2 Inſt. 397. 4 Inſt. 270. Palm. 541. Br. ancient Demeſne 33. 1 Rol. 888.

Cr. El. 104.

Paſch

Paſch. 43 Eliz.

In the King's Bench.

Sir HENRY CONSTABLE'S *Caſe.*

SIR *Henry Conſtable* brought an Action of Treſpaſs againſt *Gamble*, and declared, That King *Philip* and Queen *Mary* were ſeiſed of the Manor and Fee of *Holderneſs* in the County of *York* in their Demeſne as of Fee, as in Right of the Crown of *England*; and by their Letters Patents granted the ſaid Manor and Fee with Wreck of the Sea within the ſaid Manor and Fee, to *Henry* Earl of *Weſtmorland* in Fee, who conveyed them to Sir *John Conſtable* Father of the Plaintiff, whoſe Heir he is, in Fee: And further declared, that certain Goods, *ſcil.* twelve Shirts and five Cloaks were Wreck and caſt on the Land within the Manor of *Barneſton*, which is within the ſaid Fee of *Holderneſs*, and that the Defendant took the ſaid Goods, *&c.* The Defendant pleaded to Iſſue, and thereupon a ſpecial Verdict was found to this Effect; *ſcil.* That the Conveyance to the Pl. of the Manor and Fee aforeſaid was true as he had declared; and that the ſaid Manor of *Barneſton* was within the ſaid Fee: And further, that Parcel of the ſaid Goods were Wreck, and caſt *ſuper arenas aqua ſalſa minime coopertas Manerii de* Barneſton *infra fluxum & refluxum maris in Manerio de* Barneſton, and for other Parcel of the Goods, that they were floating *ſuper aquas maris refluentes ex arenis ejuſd' Manerii de* Barneſt. *infra fluxum & refluxum maris, &c.* And that the Defendant took all the ſaid Goods and ſeiſed them to the Uſe of the Lord Admiral, *&c.* And aſſeſſed Damages entirely for all: And *ſi ſuper totam materiam, &c.* And this Caſe was often well argued at Bar and Bench, and at laſt Judgment was given againſt the Plaintiff. And in this Caſe five Points were reſolved. 1 And. 86, 87.

1. That nothing ſhall be ſaid *Wreccum* (*a*) *maris*, but ſuch Goods only which are caſt or left on the Land by the Sea; for *Wreccum maris ſignificat illa bona, quæ naufragio ad terram appelluntur*: (*b*) *Flotſam* is when

Wrecc' maris.
(*a*) 2 Inſt. 167. Flotſam. Jetſ.
(*b*) Dalt. Sher. 90.

when a Ship is ſunk, or otherwiſe periſh'd, and the Goods float on the Sea; *Jetſam* is when the Ship is in Danger of being ſunk, and to lighten the Ship the Goods are caſt into the Sea, and afterwards notwithſtanding the Ship periſh. *Lagan (vel potius Ligan)* is when the Goods which are ſo caſt into the Sea, and afterwards the Ship periſhes, and ſuch Goods caſt are ſo heavy that they ſink to the Bottom, and the Marin. to the Intent to have them again, tie to them a Buoy, or Cork, or ſuch other Thing that will not ſink, ſo that they may find them again, & *dicitur Ligan a ligando*; and none of theſe Goods which are called *Jetſam*, *Flotſam* or *Ligan*, are called Wreck ſo long as they remain in or upon the Sea; but if any of them by the Sea be put upon the Land, then they ſhall be ſaid Wreck. So *Flotſ. Jetſam*, or *Ligan*, being caſt on the Land paſs by the Grant of Wreck: And where it is provided by the Stat. of 15 *R.*2. *c.*3. that the Court of Admiralty ſhall not have Cognizance or Juriſdict. of Wreck of the Sea, yet it ſhall have Conuſance and Juriſdict. of *Flotſ. Jetſ.* and *Ligan*; for Wreck of Sea is, when the Goods are by the Sea caſt on the Land, and ſo *infra Comitat'*, whereof the Com. Law takes Conuſance, but the other; are all on the Sea, and therefore of them the Admiral has Juriſdiction. *Bracton, lib* 3. *cap.* 3. *fol.* 120. *Item magis proprie dici poterit wreccum, ſi navis frangatur, & ex qua nullus vivus evaſerit, & maxime ſi domin' rerum ſubmerſus fuerit, & quicquid inde ad terram* (note theſe Words) *venit, erit Domini Regis.* And that alſo appears by the Book of Entries, *fol.* 611, 612. *Treſpaſs in Wreck.* Always when Wreck is claimed by Preſcript. as by Law it may be) the Pleading is, *bona wreccata ſuper mare, & ad terram project'.* And another Preſcript. is there, *habere omnimod' wreccum maris infra precinctum Manerii, ſive Dominii præd' project', & flotſam maris infra eund' præcinct' devenient'*; by which the Difference between Wreck and *Flotſ.* appears. *Vide* 9 *E.*4. 22. Wreck is when it is caſt on the Land. 11 *H.*4. 16. 5 *E.*3. 3. & 29. 21 *H.*6. *Preſcript.* 14 *E* 2. *in Treſpaſs* 236. 5 *H.*7. 36. 39 *H.*6. 37. & 9 *H.*7. 20. *acc'. Vide Regiſt. int' brevia de tranſgreſſ.* 102. *b.* the Writ ſaith, *Oſtenſurus quare cum idem* Tho. *Dominus Manerii de Eſtombavent exiſtat & ibidem habere debeat, ipſæq; & anteceſſores ſui Domini Manerii præd' a tempore quo, &c. non exiſtat memoria, hucuſque habere conſueverunt wrecc' maris infra præcinct' Maner' præd', præd'* Joceus & Robert. *bona & catalla ad valenc' cent' ſolid' apud S. infra præcinct' ejuſd' Manerii ad terram project' & quæ ad ipſum* Tho. *tanquam wreccum pertinere deberent, vi & armis ceperunt & aſportaverunt.* Alſo the Stat. of 15 *R.*2. *c.*3. proves it alſo, where it is enacted and declared, That Wreck of the Sea ſhall be tried and determined by the Laws of the Land, which cannot be extended to *Flotſ. Jetſ.* or *Ligan*, for they are in or upon the Sea, and therefore cannot be tried and determined by the Com. Law, for Trial fails, but are to be determined before the Admiral.

Dalt. Sher. 90. Spelm. Gloſſ. verbo florſan.

Dalt. Sher. 90. 1 Sid. 178. Palm. 96.

4 Inſt. 154. F.N.B. 112. C. Doct. & Stud. 156, 157.

Raſt. Ent. 684.

F.N.B. 91. d.

2. L

2. In this Case it was resolved by the whole Court, that the Soil on which the Sea flows and ebbs; *sc.* between the high Water Mark and low Water Mark may be Parcel of the Manor (*a*) of a Subject, 16 *El. Dier* 326. *b. acc'*. And so it was adjudg. in (*b*) *Lacy's* Case, *Trin.* 25 *El.* in this Court. And yet it was resolved, That when the Sea flows, and has *plenitud' maris*, the Admiral shall have Jurisdict. of every Thing done on the Water, between the high Water Mark and low Water Mark, by the ordin. and natural Course of the Sea: And so it was adjudged in the said Case of *Lacy*, that the Felony committed on the Sea *ad plenitud' maris*, between the high Water Mark and the low Water Mark, by the ordin. and natural Course of the Sea, the Adm. should have Jurisdict. of; and yet when the Sea ebbs, the Land may belong to a Subject, and every Thing done on the Land when the Sea is ebbed shall be tried at the Com. Law, for it is then Parcel of the County, and *infra corp' Comitat'*, and therewith agrees 8 *E.* 4. 19. *a*, So note, that below the low Water Mark the Admiral has the sole and absolute Jurisdict. and between the high Water Mark and low Water Mark, the Com. Law and the Admiral have *divisum Imperium*, interchangeably as is aforesaid, *sc.* one *sup. aquam*, and the other *sup. terram.* And Sir *J. Popham* Ch. Justice said, That on a Trial at *Nisi prius* between the City of *Bristol* and the Ld. *Berkley*, it was held by the Justices of Assise, That where the Ld. *Berkley* had a Manor adjoining to the *Severn*, and prescribed to have Wreck within his Manor, and certain Goods floated between the high Water Mark, and low Water Mark, and the City of *Brist.* had *Flotf.* there; that the said Goods were not Wreck as long as they were floating upon the Water between the high Water Mark and low Water Mark. See the Book in (*c*) 5 *E.* 3. 3. *a.* in a Replevin brought by *Will. de Newport* of *London* against Sir *Hen. Nevil*, and declared that the Def. took 3 Lasts of Herrings, and a Ship; the Def. pleaded that he was Ld. of the Manor of *Walring*, and prescribed to have Wreck within his Manor *a tempore cujus, &c.* and that the Herrings and Ship were Wreck within his Manor: To which the Pl. said, that they were our Goods in the Keep. of our Mariners which arrived by the Sea, and we say that he took 'em out of their Custody: Judgm. if he can claim as Wreck? To which the Def. said, we took 'em as Wreck, out of all Custod. on which Book I observe 3 Things, 1. That Wreck may be claimed by Prescript. 2. That forasmuch as a Ship cannot be Wreck, *sc.* cast on the Land, but between the high Water and low Water Mark, thence it follows, that that was Parcel of the Manor: 3. If the Ship perishes, yet if any of the Servants escape, the Law saith, that they have the Custody of the Goods, and they are not Wreck, 39 *E.* 3. 5. *a. b.* One (*d*) prescribed to have royal Fish, as Porps, *&c.* found within his Manor, which seems to be between the high Water and low Water Mark.

3. It was resolved, That the K. should have *Flotf. Jetf. & Ligan*, when the Ship perishes, or when the Owners of the Goods

Terra inter fluxum & refluxum maris.
(*a*) 2 Rol. 170.
(*b*) 3 Inst. 48. 113. 2 Co. 93. a. 13 Co. 53. 1 Leon. 270. Moor 121, 122. 1 Rol. Rep. 139. 1 Bulstr. 203. Dalt. Just. 340. 2 Brownl. 34.
(*c*) Fitz. Replev. 41. 2 Inst. 167.
(*d*) 3 Bulst. 3. b. Co. Lit. 114. b.

are not known, for in 46. E. 3. 15. it appears, that Goods cast into the Sea for Fear of Tempest are not forfeited. *Vide F.N.B.* 112. c. 5 E. 3. 33*. 9 E. 4. 22. that the Ship ought to perish, which is called Shipwrack: And that is also proved by the said Act of *West.* 1. c. 4. (a) where it is said, if a Man, Dog, or Cat escape alive, (which is to be intended when the Ship perishes) and therewith agrees *Bract. lib.* 2. c. 18. *fol.* 41. *Item sine tradit' res habita pro derelict', ubi Dom' statim desinit esse Dom', si autem causa navis allevandæ, non sic, quia non ea voluntate ejecit quis, ut desinat esse Dom', &c.* And a Man may have *Flotf.* and *Jetf.* by the K's Grant, and may have *Flotf.* within the high Water and low Water Mark by Prescription, as appears before. And those of the West Country prescribe to have Wreck in the Sea so far as they may see an *Humber* Barrel.

* The Orig. is 23. but Q. if it should not be 3.

(a) 2 Inst. 166, 167. Dalt. Sher 89. Vaugh. 168

4. It was resolved, that the Stat of *West.* 1. c. 4. by which it is enacted, that of Wreck of the Sea it is agreed, that where a Man, a Dog, or a Cat, escape alive out of the Ship, that such Ship, nor Barge, nor any Thing within them shall be adjudged Wreck, but the Goods shall be saved and kept by View of the Sheriff, Coroner, or King's Bailiff, &c. so that if any sue for those Goods, and after can prove that they were his, or perished in his Keeping within a Year and a Day, they shall be restored to him without Delay, &c. was but a Declarat. of the Com. Law; and therefore all that which is provided as to Wreck, extends also to *Flotf. Jetsam* and *Lagan. Bract.* who wrote in the Time of *H.* 3. before the Making of the said Act, speaking of Wreck before saith, *Et qd' hujusm' dici debet wreccum, verum est, nisi sit, qd. verus Dom' aliunde veniens & certa judicia & signa donaverit res esse suas, ut si canis vivus inveniat', & constare poterit, qd' talis sit Dom' illius canis præsumptive, ex hoc illum esse Dom' illius canis & illarum rerum; eod' modo si certa signa imposita fuerint mercibus*: By which it appears, that the Stat. of *West.* 1. which was made 3 *E.* 1. was but a declaration of the (b) Com. Law, against the Opin. in *Dr.* and *Stud. lib.* 2. *f.* 118. and if the Owner dies, his Ex'ors or Administrat. may make their Proofs. And in many Cases concerning Time, the Com. Law gives a Year and a Day for a convenient Time; as in the Case of a Stray, if the Own. Proclamat. being made) don't claim it within a Year and a Day, it is forfeited. So a Year and a Day is given in Case of Appeal, and in Case of Descent after Entry or Claim; of Nonclaim on a Fine, or Writ of Right at the Com. Law; of a Villain dwelling in (c) ancient Demesne; of the Death of a Man who has a Blow or Wound; of Protections, Essoins of the K's Service, and in many other Cases: And the Year and Day in Case of Wreck, shall be (d) accounted from the Taking or Seizure of them as Wreck; for altho' the Property is in Law vested in the Ld. before Seizure, yet until the Ld. seises, and takes it into his actual Possess. it is not notor. who claims the Wreck, nor to whom the Own. shall repair to make his Claim, and to shew to him his Proofs. And if the

(b) 2 Inst. 166, 168. Dalt. Sher. 91. Dr. & Stud. lib. 2. cap. 51.

(c) Co. Lit. 254.

(d) 2 Inst. 168. Dalt. Sher. 91. Vaugh. 168.

Wreck

Wreck belongs to the K. the Party may have a Commiſ. (*a*) to hear and determ. the Truth of it, and that by the Verd. of 12 hon. Men, for no (*b*) Proof is allow. by Law, but the Verd. of 12 Men: And if it belongs to other than the K. then if the Own. cannot ſatisfy him who claims them as Wreck by his Mark or Cocket, or by the Book of Cuſt. or by Teſtimony of honeſt Men, then the Own. may have ſuch Commiſ. or may bring his Act. at the Com. Law, and prove it by the Verd. of a Jury; and if the Commiſ. be awarded, or the Act. be brought within the Year and Day, altho' the Verd. be given for him afterwards, it is ſuffic. *Vid. Regiſt.* and *F.N.B.* 12. For the Commiſ. *vide Stat. Weſt.* 1. *c.* 4. 4 *E.* 1. *de Offic. Coronat.* 15 *R.* 2. *c.* 3. 27 *E.* 3. *c.* 13. *Britton c.* 17. 33 *Stamf. Prærog. Regis. Et nota*, that the Act (*c*) *de Prærog. Regis* made in 17 *E.* 2. *c.* 11. enacts, *Qd' Rex hab. Wrecc. maris per tot. regn. &c.* is but a Declarat. and an Affirm. of the Com. Law. For notwithſtand. that Stat. being made within Time of Memory, a Man may preſcribe to have Wreck, as appears in 11 *H.* 4. 16. *Stamf.* 38. *F.N.B.* 91. *d.* 5 *H.* 7. 36. 5 *E.* 3. 3. & 59. 9 *E.* 4. 12, *&c.*

5. It was reſolv. in the Caſe at Bar, that Part of the Goods paſſed by the Name of Wreck, and Part of the Goods were *Flotſ.* and did not paſs by the Grant of Wreck, and Damages were intirely aſſeſſed for all. And in Treſp. the Pl. ſhall recover Damages only for the Value of the Goods, wherefore Judgm. was given againſt the Pl. And the Book 21 *H.* 7. 34. *b.* was cited, where the Caſe is, that in Treſp. the Def. juſtified as to one Thing, and pleaded not guilty to anoth. and they were at Iſſue, and the Jury inquired of one Thing only, and taxed the Damages for both intirely. *Fineux* held the Verd. good for the Thing found, and of that he ſhould have a Writ of Inquiry of Damages, *Qd' fuit negatu' per tot. Cur. Dy.* 22 *El.* 269. *in Eject. cuſtod.* agrees with this Judgm. And it was adjudged *M.* 14 & 15 *El.* in this Court in Treſpaſs by *Pooly* (*c*) againſt *Osburn* for Breaking his Cloſe and beating his Servant, and doth not ſay, *per qd' ſervit. amiſit*, the Def. pleaded not guilty, and the Jurors found him guilty and aſſeſſed Damages intirely; and becauſe the Pl. had not Cauſe of Act. for Beating of his Servant, becauſe he had not averred that he loſt his Service, for that Cauſe the Pl. took noth. by his Bill. And *Catl.* then Ch. Juſt. cauſed the Reaſon and Cauſe of the Judgm. to be noted in the Margent of the Record: 9 *H.* 7. 3. in *Reſcous acc'*. And it was adjudged accordingly *M.* 30 & 31 *El.* between *More* and (*f*) *Bedell*, in an Action on the Caſe on *Aſſumpſ.* which began in the K's Bench, *M.* 28 & 29 *El. Rot.* 476. where the Defendant promiſed to do divers Things, and the Plaintiff alledged two Breaches, whereof one was inſufficient, the Defendant pleaded *Non aſſumpſit*, the Jury gave Damages generally. It was reſolved, 1. That it ſhould be intended that they gave Damages for both: 2. That forasmuch as the Plaintiff had no (*g*) Cauſe of Damages for the one, for that Cauſe the Judgment given for the Plaintiff

(*a*) Dalt. Sher. 91.
(*b*) 4 Co. 74. b. 9 Co. 20. a. 11 Co. 39. a. Hob. 93, 217. 1 Rol. Rep. 222. 261. 2 Rol Rep. 40. 2 Rol. 595. 1 Sid. 313. 3 Bulſtr. 55. Cr. Jac. 188, 232, 381, 488. 2 Brownl. 57. Cr. El. 723. Mo. 113. pl. 253. 180, 181. pl. 322. 845. pl. 1140. 485. pl. 1250. Perk. Sect. 791. 3 Inſt. 98. Br. condit. 151.
(*c*) Dal. Sher. 93. Stanf. prerog. 37. b. 38. a. 2 Bulſt. 36. Spelm. Gloſſ. verb. Wreccum

(*d*) 10 Co. 130. a. 11 Co. 45. b. 56. a. 1 Rol. 784. Dy. 369, 370. pl. 56. Hardr. 166. Srile 399. 2 Bulſt. 28. 1 Leon. 92. pl. 118.
(*e*) 10 Co. 130. b. 2 Bulſt. 102. 2 Rol. Rep. 52. Hard. 166.
(*f*) 10 Co. 131. a. 1 Rol. 242, 243, 244, 245, 24. Goldsb. 91. 1 Leon. 170. 1 Rol Rep. 270, 437. 2 Rol. Rep. 2, 192. Jenk. Cent 264. Winch 33. 3 Bulſtr. 258. Hard. 399. Palm. 107. Bridg. 58, 59.
(*g*) Cr. Jac. 115. Cr. Car. 32. 10 Co. 116. a.

in the King's Bench was reverſed by a Writ of Error in the Exchequer-Chamber.

Dalt. Sher. 91. Eſtray, Animalia vagantia, ſive vacantia.

Note Reader, at firſt *(a)* the Common Law gave as well *Wreck*, *Jetſam*, *Flotſam*, and *Lagan* upon the Sea, as Eſtray, (which *Bracton* calls *animalia vagantia*, or as others call them *animalia vacantia*, *quia Domino vacari debent*,) Treaſure-trove, and the like to the King, becauſe by the Rule of the Common Law, when no Man can *(b)* claim Property in any Goods, the King ſhall have them by his Prerogative. And therefore *Bracton*, *lib.* 3. *cap.* 3. ſaith, *Sunt alia quædam quæ in nullius bonis eſſe dicunt', ſicut wreccum maris, groſſus piſcis, ſicut ſturgio, & balena, & aliæ res quæ Dominum non habent, ſicut animalia vagantia, quæ ſunt Domini Regis propter privilegium.* So that it appears by *Bracton* that the King ſhall have Wreck, as he ſhall have great Fiſh, &c. becauſe they are *(c) nullius in bonis*, or as he ſhall have *animalia vagantia, ſive vacantia, ſcil.* Eſtrays, becauſe none claims the Property. And note, that Wreck is Eſtray on the Sea coming to Land *(d)*, as Eſtray of Beaſts is on the Land coming within any privileged Place; and the Law gives in both Caſes a Year and a Day to claim them. And *Bracton in eod' lib.* 3. *cap.* 33. *fol.* 135. ſaith, *Navis, nec batellus, nec alia catalla de his qui ſubmerſi ſunt mari, nec in ſalſa nec in dulci aqua, wreccum erit, cum ſit qui catalla illa advocet, & hoc docere poterit*; and ſo he properly before reſembled it to an Eſtray: And if the Goods of an Infant *(e)*, Feme-covert Executrix, Man in Priſon, or beyond Sea, Eſtray and are proclaimed according to the Law, if none claim them within the Year and the Day, they ſhall be all bound. The ſame Law of Wreck of Sea, for the Law is *(f)* ſtrict and binding in both Caſes; but it appears by the Opinion of *Bracton* and *Britton* alſo, that *Flotſ. Jetſam*, and *Lagan*, ſo long as they are in or upon the Sea, do not belong to the K. *ſed occupanti concedunt', quia non eſt aliquis qui inde privileg' habere poſſit, Rex non magis quam privata perſona propter incert' rei eventum* (*& paulo ante reddit inde ration'*) *eo qd' conſtare non poſſit ad quam regionem eſſent applicanda.* And *Britton lib.* 1. *c.* 17. Treaſure hid in the Ground, we will that it be ours, and if it be found in the Sea, be it to the Finder. But as it appears before by the Reſolut. of the whole Court. the K. ſhall have *Flotſ. Jetſ.* and *Lagan*, as is aforeſaid, by his Prerogative, altho' they be in or upon the Sea; for the Sea is of the K's Allegiance, and Parcel of his Crown of *Engl.* as it is held *6 R.* 2. *Protect.* 46. *& Britton c.* 33. well agrees with the Opinion of *Bract. ſc.* that Wreck is of a Thing *in nullius bonis*; for there he ſaith, it is alſo purchaſed by Franchiſe granted, by Name of a Thing found in no Man's Goods, as a Wreck of Sea, and Cattle eſtraying, Conies, Hares, Patridg. and other ſavage Beaſts, by Franchiſe to have Wreck found in his Soil, and Waif and Stray found in his Fee, Warrens, and his Demeſne Lands.

(b) Dr. & Stud. 156. b. 2 Vent. 188. 3 Inſt. 132.

(c) Vent. 188.

(d) Dalt. Sher. 91.

(e) Dalt. Sher. 91, 92, 79.

(f) Dalt. Sher. 91, 92.

Paſch.

Paſch. 43 Eliz.

In the King's Bench.

FOXLEY's *Caſe.*

Foxley brought an Action of Trover and Converſion of 20 Sheep; the Def. pleaded, that the Queen was ſeiſed of the Manor of *Newport-panel* in the County of *N.* and that certain Perſons unknown ſtole the ſaid Sheep from the Pl. and brought them within the ſaid Manor, and there left, and waived them; wherefore the Def. as the Queen's Bailiff of the ſaid Manor, ſeiſed them to the Queen's Uſe, as Goods waived there, which is the ſame Trover and Converſion, and demanded Judgment, *ſi Regina inconſulta?* upon which the Pl. demur'd. And he was ouſted of the *(a)* Aid by Judgment, for it doth not appear by the Def. bar that theſe Goods were forfeited to the King; for it was reſolved, if a Man ſteals my Goods, and brings them into a Manor, and there leaves them in his Houſe, or in the Houſe of any other, or in the Cuſtody of any other, or hides them in the Ground, or other ſecret Place, and afterwards flies, theſe Goods are not forfeited, nor ſhall be ſaid Waif in Law, for *(b)* Waif is where the Felon in purſuit waives the Goods, or when the Felon for fear of being apprehended, thinking that Purſuit was made, having them with him in his Poſſeſſion flies, and waives the Goods, in theſe Caſes they ſhall be ſaid waived in Law: But if he has not the Goods with him when he flies being purſued, or for fear of being apprehended, they are not waived nor forfeited, but the Owner may take them when he will without any freſh Suit. But if the Thief in his Flight waives them, there the Goods are forfeited by the Com. Law, if the Felon on freſh Suit was not attainted at the Suit of the Owner of the Goods. And the Reaſon *(c)* that Waif is given to the King, and that the Party ſhall loſe his Property in ſuch Caſe is, for Default in the Owner that he doth not make freſh Suit to apprehend the Felon; for *(d) intereſt Reipublicæ ne maleficia remaneant impunita, & impunitas ſemper ad deteriora invitat*, and therefore the Law has impoſed this Penalty on the Owner, that if the Thief by his Induſtry and freſh Suit be not attainted at his Suit, (*ſcil.* in Appeal of the ſame Felony)

Moor 572. Cr. El. 693, 694.

(a) 1 Rol. 150. Cr. El. 693, 694. Moor 572. 2 Inſt. 269.

(b) Dalt. Sher. 78. Moor 572. Yelv. 5. Bona waiviata ſive derelicta.

(c) Cr. El. 694.

(d) Godb. 240.

Felony) he ſhall for his Default loſe all his Goods which the Thief at the Time of his Flight waived. But if the Thief has them not with him when he flies, having perhaps hid them (as it is ſaid) there no Default can be in the Party; and therefore they ſhall not be forfeited, for if he makes freſh Suit after Notice of the Felony, it is ſufficient.

Bona fugitivotum.

So note Reader, *bona waviata ſeu derelicta*, are Goods which are ſtollen and waived by the Thief in the Flight. *Bona fugitivor'* are the proper Goods of him who flies for Felony. But it is to be obſerved, that if a Man flies for Felony, his proper Goods are not forfeited until it be found by Indictment before the Coroner, in Caſe of Death, or otherwiſe lawfully found of Record, on Acquittal, that he fled for the Felony: For if the Goods of any ſhould be forfeit. only by the Flight, without more, then a Man might have ſuch Goods ſo forfeited by Preſcription, in the ſame Manner as he may have Goods waived, eſtray, or Treaſure found, *&c.* But foraſmuch as *bona fugitivor'* are not forfeited, until the flying be lawfully found of Record, and becauſe Things forfeited by Matter of Record cannot be claimed by Preſcription, which is but Matter in Fact, for this Cauſe they cannot be claimed by Preſcript. (*a*) 46 *E.* 3. 16. *b.* & 9 *H.* 7. 20. *a. acc'*. But waif, eſtray, Treaſure found, wreck of the Sea, *&c.* which may be gained by Uſage without Matter of Record, there a Man may preſcribe to have them, 21 *H.* 6. *Preſcription*, 1 *H.* 7. 23. *b.* 9 *H.* 7. 20. *a.* 46 *E.* 3. 16. *b.* 22 *E.* 3. *Coron.* 241. Alſo he ſhall not (*b*) forfeit the Goods which he had at the Time of the Flight (as he ſhould do if they were abſolutely forfeited by the flying) but thoſe which he has at the Time of the Indict. or Acquittal. *Vide* 3 *E.* 3. *Cor.* 344. & 8 *E.* 2. *Cor.* 296. 5 *H.* 4. *Forfeit.* 52. 33 *E.* 3. *Forfeit.* 30. 42 *Aſſ.* 5. *Vide Stamford's Pl. of the Cro.* 15. 184. *c.* 192. And the flying of a Felon, either ought to be found by Verdict on his Acquittal (for altho' he be found Not Guilty, yet he ſhall forfeit his Goods by the flying, *Quia* (*c*) *fatet' facin', qui judiciu' fugit*, and the Law will not admit any Proof againſt this Preſumpt.) or on Indict. found *ſuper viſ. corpor'* before the Coron. if it be in Caſe of the Death of a Man, *Vide* 22 *Aſſ.* 76. 13 *H.* 4. 13. 3. *E.* 3. *Forf.* 35. and it appears there, that altho' the Jury that tried him find him Not Guilty, and further that he did not fly, yet the Goods are forfeited by Force of the finding of the flying before the Coron. But on no other Indict. the flying ſhall be found, unleſs it be in ſpecial Caſes. As if a Felon be arreſted of Felony, and as he is carrying to Gaol, in flying, thoſe who purſue him cannot apprehend him without killing him, wherefore they kill him, if all this Matter and the Flying be preſented before the Coroner, or any other who has Authority to enquire of Felonies, the Party ſo killed ſhall forfeit all his Goods and Chattels, and therewith agrees 3 *E.* 3. *Coron.* 287. 312, & 328. And there it appears, that in ſuch Caſe it is not Felony in them that purſued him. 3 *E.* 3. *Forfeit.* 25, If a true Man kills a Thief who would (*d*) rob him, if the Thief does not retreat, he ſhall forfeit nothing. And the Reaſon

(*a*) Dalt. Sher. 79. 9 Co. 24. b. 2 Inſt. 281. 3 Inſt. 55, 227, 133. Co. Lit. 114 a. Stan'. Prerog. 28. a. 50. a. 46 E. 3. 16. b. 1 H. 7. 23. b. 9 H. 7. 11. b. 20. a. 27 H. 7. 33. b. 2 Rol. 270. Br. Corone 129. Firz. preſcript. 27. 8 H. 4. 2. a. Br. Eſtray. 13. Cr. El. 560. Moor 707. Kelw. 150. b.

(*b*) Co. Lit. 391. a.

(*c*) 11 Co. 60. b.

(*d*) 3 Inſt. 56.

of the Book in 45 *E.* 3. *Coron.* 100. that if a Man ſteals divers Goods, and the Owner in his Appeal *(a)* omits ſome Part, the King ſhall have all that which is omitted, is becauſe by this Omiſſion the Thief may eſcape, and becauſe the Owner cannot have them, the King ſhall have them: And as in theſe Caſes the Law puniſhes the Owner for his Negligence or Connivance, ſo the Com. Law abhors Malice in ſeeking the Blood of any without juſt Cauſe. And therefore if *A.* has the Goods of *B.* by Bailment or Trover, and *B.* brings an Appeal of Robbery againſt *A.* for taking them felonioufly, and it is found that they were the Plaintiff's Goods, and that the Defendant came to them lawfully; in this Caſe the Plaintiff ſhall forfeit the Goods to the King for his *(b)* falſe and malicious Appeal, as it is adjudged in 3 *E.* 3. *Coron.* 367. Alſo *bona & catalla felonum* in ſome Caſes ſhall be *(c)* forfeited by Conviction, and ſometimes without Conviction. But always when any Forfeiture is of any Felons Goods it ought to appear of Record, and that is the Reaſon that ſuch Goods cannot be claimed by *(d)* Preſcription, as appears by the ſaid Books. At Com. Law the Goods of a Clerk convict, by Verdict or Confeſſion were forfeited to the King, not only all which he had at the Time of the Conviction, but all the Goods which he ſhould acquire afterwards until he had made his Purgation, or obtain'd his Pardon; for at the Com. Law every Clerk convict, who had the Benefit of his Clergy either could make his Purgation, or could not make it; if he could make his Purgation, then the Entry was, *Quod talis commiſſus eſt ordinario*, and if he could not make his Purgation, then the Entry was, *quod talis commiſſ. fuit ordinar' abſq; purgat' facienda.* And in Caſe when he could not make his Purgation, or in Caſe when he could make Purgation, till Purgation made, he remained a Perſon diſabled to take Goods to his own Uſe: And therefore Queſtion has been made on the Stat. of *(e)* 18 *Eliz. cap.* 7. by which it is enacted, That after Clergy allowed, and burning in the Hand, the Priſoner ſhall be preſently enlarged and delivered out of Priſon: If one after the Stat. is convicted of Felony, and has his Clergy, and is burnt in the Hand, and afterwards acquires Goods, if he ſhall forfeit his Goods which he acquires after till he obtains his Pardon; For now he cannot make Purgation, and Peradventure the Cauſe or Offence was ſuch, that he could not make Purgation. And *Paſch.* 41 *Eliz.* in *B. R.* this Doubt was reſolved; for in Action on the Caſe on Trover, brought of certain Goods by *(f) Heſdon*, as Adminiſtrator of *Riddleſon* againſt *Maſterſon*; The Defendant pleaded that before the Trover the Inteſtate was convicted of Felony, and burnt in the Hand: and afterwards acquired the ſaid Goods, on which the Plaintiff demurr'd in Law; And it was adjudged for the Plaintiff, for inaſmuch as the Statute has taken away the ordinary Means and Power from him who might make Purgation, which

Bona confiscata. ſeu forisfacta.
(a) 3 Inſt. 217 Dalt. Sher. 80.
(b) Dalt. Sher. 81. 3 Inſt. 227.
Bona felonum.
(c) Co. Lit. 114. a. 391. a.
(d) 9 Co. 24. b. 2 Inſt. 281. Co. Lit. 114 a. Dalt. Sher. 79. Stanf. Prærog. 28. a. 50. a. 46 E. 3. 16. b. 1 H 7. 23. b. 2 Rol. 270. Br. Coron. 129. 9 H. 7. 11. b. 20. a. 27 H.7. 33. b Fitz. Preſcription 27. Br. Eſtray 13. 8 H. 4. 2. a. 3 Inſt. 55, 133, 227. Cr. El. 560. Moor 707. Kelw. 150. b.
(e) 5 Co. 50. b. Raym. 370. 6 Co. 68. b. Cr. Jac. 430, 431. 2 Rol. 222. Hob. 291, 294. Hale's Pl. Cor.
(f) Hob. 292. 6 Co. 68. a. b. Raym. 370, 380. 3 Inſt. 114, 242.

which was the ordinary Means to make himſelf capable of Goods to his own Uſe: And as to him who could not make his Purgation, foraſmuch as by the ſaid Act it is enacted, That he ſhall be preſently enlarged and delivered, which is in Lieu of a Pardon by good Conſtruction, the ſame Act of 18 *Eliz.* has made him as capable in both Caſes to purchaſe Goods to all Purpoſes, as if he had made his Purgation in the one Caſe, or obtained his Pardon in the other. But it is to be known, that altho' the Felon had made his Purgation at Common Law, that was only to (*a*) enable him to purchaſe Goods and Chattels; for notwithſtanding the Purgation he forfeited his Goods which he had before his Purgation, and the Profits of his Land alſo till Purgat. made, againſt the Book in 3 *E.* 3. *Corone* 365. *Vide* 8 *E.* 2. *Forfeiture* 34. But now preſently by his Delivery on the ſaid Act of 18 *Eliz.* he is diſcharged againſt the King of the Profits which ſhall come after: And if the King pardons the Burning of the Hand, it is within the ſaid Act, altho' the Words are after Clergy allowed, and Burning of the Hand, for the Pardon has diſcharged the Puniſhment. And there it was reſolved, That if a Man obtains a Pardon before Conviction, he ſhall not forfeit his Goods, nor the Profits of his Lands. (*b*) *Laughton*'s Caſe, *Hill.* 37 *Eliz.* in the *King's Bench* it was reſolved by *Popham* Chief Juſtice, and the whole Court of *King's Bench*, That if a Man be *ſelo de ſe*, his Goods are not (*c*) forfeited till it is preſented or found of Record, and that is the Reaſon that ſuch Goods cannot be claimed by Preſcription. Then it was moved if one be *ſelo de ſe*, and caſt into the Sea, (*d*) or conveyed or buried in ſo ſecret a Manner that the Coroner cannot have the View of the Body, and by Conſequence he cannot enquire of it: It was reſolved, that the Juſtices of Peace, Juſtices of Oyer and Terminer, and all others who have Power and Authority to enquire of Felonies, may take a Preſentment of it, for it is Felony, and that ſhall ſerve to entitle the King to his Goods and Chattels. And (*e*) *Deodanda* are Goods which occaſion the Death of a Man by Miſadventure, and are not forfeited till the Matter is found of Record, and therefore they cannot be claimed by Preſcription. And the Jury who find or preſent the Death by ſuch Miſadventure, ought (*f*) to find and value the *Deodand* alſo: *Omnia quæ movent ad mortem ſunt Deodanda. Vide* 3 *E.* 3. *Corone* 326, 341, 342. 8 *E.* 2. *Corone* 401. *Vide* 12 *R.* 2. *Forfeit.* 20. There are alſo *bona & catalla in exigendo poſitorum*; and theſe are when any one is appealed or indicted of Felony, and he withdraws and abſents himſelf for ſo long Time that an (*g*) *Exigent* is awarded againſt him, by this Retreat (which is a flying in Law) he ſhall forfeit all his Goods and Chattels which he had at the Time of the *Exigent* awarded, altho' he renders himſelf on the *Exigent* and

(*a*) Hale's Pl. Cor. 241.

(*b*) Langhton's Caſe, Hill. 37 Eliz. in B.R. Swinb. 72. 3 Inſt. 55.

Bona felon' de ſe.

(*c*) Stanf. Prærog. 46. a. 3 Inſt. 54, 55. Poph. 209. 1 Rol. Rep. 217.

(*d*) 2 Rol. 96.

(*e*) Deodanda.

Stanf. Cor. 20, 21. Dalt. Sher. 81. 3 Inſt. 57.

(*f*) Dalt. Sher. 81.

Bona in exigendo poſitorum.

(*g*) Dalt. Sher. 82. Stanf. Prærog. 47. a. 3 Inſt. 232.

and is afterwards found Not Guilty; and that appears by 22 *Ass.* where the Case was, That a Man indicted of the Death of a Man did render himself, on the Exigent, and was presently arraigned, and found Not Guilty, and because he came by *Exigent*, by which it was sufficiently proved that he withdrew himself, his Chattels were forfeited, and the Jury who acquitted him valued the Goods. And in 41 *Ass. pl.* 13. at the Time of the *Exigent* awarded against divers in an Appeal of Death, a Writ was awarded to the Sheriff to enquire of their Goods and Chattels, and to seise them: But peradventure at the Time of the *Exigent* awarded the Def. was in Prison, or beyond Sea, what Remedy has the Party to have his Goods again? For as *Knivet* in 43 *E.* 3. 17. saith, the Party shall not have (*a*) Restitution of his Goods (altho' the Writ of *Exigent erronice emanavit*) so long as the Award of the *Exigent* (which is there called a Judgment) stands in Force not defeated. And in the same Book it is said, That if a Man has a Charter of Pardon, of elder Date (*b*) than the *Exigent*, his Goods are saved, for the Cause of Salvation appears of Record: But it doth not appear by the Book what Remedy the Party has, if the Cause of saving them be by Matter in Fact, as by Imprisonment, or that the Party was beyond the Sea, &c. And *Mich.* 33 & 34 *Eliz.* in the *King's Bench* in (*c*) *Marshe*'s Case it was resolved, That in such Case the Party or his Executors or Administrators should have a Writ of Error to reverse the said Award of the *Exigent*: And a Precedent in 18 (*d*) *H.* 7. in this Court in the Case of one *Eaton*, against whom on an Indictment of Death, an *Exigent* was awarded in the County of *Lincoln*, and the said *Eaton* died, and was never convicted or attainted, and his Executors brought a Writ of Error to reverse the said Award of the *Exigent*; For inasmuch as the King is intitled by Matter of Record, of Necessity it ought to be avoided by a Matter of as high a Nature. And forasmuch as the Words of a general Writ of Error are (*si (e) judicium inde redditum sit*) which is not in such Case, he shall have a special Writ reciting the whole special Matter, as by the Precedent appears. *Vide* 30 *H.* 6. *Forfeiture* 31. 19 *E.* 3. *Forfeiture* 19. 8 *E.* 3. 11. 29 *E.* 3. 29 & 30. 37 *H.* 8. *Estray*, *Br.* 9. *Stamford's Pleas of the Crown* 186. And so it was resolved, that in the Case at Bar there was no Cause of Aid, and therefore by the Rule of the Court he was ousted of the Aid.

(*a*) 3 Inst. 232, 242.

(*b*) Dalt. Sher. 87.

(*c*) 1 Leon. 325, 326. Owen 147, 148. Cr. El. 225, 273, 274. 1 Rol. 912. Godb. 377, 380.

(*d*) Eaton's Case, 18 H. 7. in B. R. 2 Sid 93. 11 Co. 41. a. Cr. Jac. 357. 1 Rol. Rep. 85.

(*e*) Co. Lit. 288. b.

2. It was agreed, That the Demurrer was not peremptory, but to answer over. See now the Statute of 21 (*f*) *H.* 8. *cap.* 11. concerning Goods waived, and for the Restitution of them.

Ye'v. 112.

(*f*) 3 Inst. 242.

Pasch.

Pasch. 43 Eliz.

In the King's Bench.

MALLORY's *Case.*

Cr. El. 805, 806, 832, 833.

IN Replevin between *Mallory* Pl. and *Payn* Def. the Case was such; The Abbot and Covent of *Sawtry* by Deed indented, demised the Place, where, &c. to *Anthony Mallory* for 120 Years, rendring Yearly during the said Term to the Abbot and Covent, or their Successors, the Rent of eight Marks, to be paid at the Feast of St. *Michael* and the Annunciation of our Lady by equal Portions, on Condition that if the Rent be behind, and a Distress taken by the Lessor, &c. and not redeemed within six Weeks, that it should be lawful to the Lessor, &c. to re-enter. The Abbot and Covent surrender their Monastery and all their Possessions to King *H.* 8. The Term by divers mean Assignments was assigned to *Mallory* the Pl. and the Reversion by divers mean Conveyances to one *S.* who levied a Fine thereof to Dr. *Bellay*, who before any Attornment granted the Reversion by his Deed to *Thomas Bellay* his Son and his Heirs, to whom the Tenant attorned: And for Rent arrear, and Distress taken according to the Condition, &c. *Payn* by the Commandment of *Thomas Bellay* the Son, re-entred and distrained the Plaintiff's Cattle Damage-feasant: And the Question was, whether the Entry of *Thomas Bellay* the Son be lawful or not. And after divers Arguments at Bar and Bench, it was resolved by the whole Court that the Entry was lawful. And in this Case four Points were resolved:

(a) Cr. Eliz. 832. 1 Vent. 148. Hard. 91, 94. 2 Sand. 369. 1 Bulst. 175. Ley 79. 3 Bulst. 328. Palm. 482. 1 Jones 309. Godb. 363, 449, 450. Latch 99.

1. That the said *(a)* Reservat. in the Disjunct. was good, for in the first Part of the Reservat. the Words are, rendring Yearly during the Term; and the subsequent Words ought to have such Interpretat. that they do not confound them which precede, but that all together may stand and satisfy the Intent and Meaning of the Parties. And such Construct. the Judges made in *Hill* and *Graunge*'s Case, *Plow. Comm.* 164 where

where a Leaſe was made in *January* for Years, rendring Yearly during the Term to the Leſſor Rent, payable at the Feaſts of S. *Michael* and the *(a) Annunciation*, which laſt Words ſhall be ſo marſhalled and tranſpoſed, that the firſt Words, *ſcil.* rendring Yearly, ſhall not loſe any of their Force: And therefore the Law ſhall make Conſtruction, that the Rent ſhall be paid at the Feaſts of the *Annunciation* and S. *Mich.* And it was agreed, that rendring Rent Yearly during the Term to one and his Succeſſors, and rendring Rent during the Term to him or his Succeſſors are all one; for if the Rent be reſerved to him and his Succeſſors, altho' the Words are joint and in the Copulative, yet in Conſtruction of Law the Leſſor ſhall have it during his Life; and his Succeſſor after his Deceaſe. So when Rent is reſerved Yearly during the Term to *(b)* one or his Succeſſors, theſe Words (to him or his Succeſſors) are Words of Explanation, *ſcil.* to direct the Leſſee to whom he ſhall pay the Rent during the Term, *viz.* to the Leſſor during his Life, and after his Death to his Succeſſors, for without theſe Words *ſcil.* to the Leſſor or his Succeſſors, the Reſervation had been good by Force of theſe Words (rendring Yearly during the Term) as it is agreed in 10 *E.* 4. 14. & 27 *(c) H.* 8. 19. But if a Feoffment be made to *A.* to have and to hold to him, *(d)* or to his Heirs, there he has but an Eſtate for Life, for there want precedent Words to direct the Words in the Disjunctive: And theſe Words (his Heirs) are of the Eſſence of the Eſtate, and without them no Eſtate of Inheritance ſhall paſs. So and for the ſame Reaſon if a Reſervation on a Feoffment in Fee be made to one or his Heirs, ſuch Reſervation is not good but during the Life of the Feoffor. And ſo note the Difference. *Vide Chapman*'s Caſe, *Plow. Comm.* 284. where a Copulative ſhall be taken for a Disjunctive; but here the Disjunctive doth amount in Conſtruction to a Copulative. See the Caſe in *(e)* 21 *E.* 3. 29. *b.* where one was bound that when the Obligor ſhould come to his Aunt, he would enfeoff the Obligee, or the Heirs of his Body of certain Lands; and the Obligee when the Obligor came to his Aunt requeſted him to enfeoff him, which the Obligor refuſed to do: And it was adjudged that he had forfeited his Obligation; for although the Condition was in the Disjunctive, and that the Condition is always for the Benefit of the Obligor, yet foraſmuch as the Feoffment was to be made when he came to his Aunt, and when he came to her the Obligee was alive, and therefore it was not poſſible then to enfeoff his Heir, for this Cauſe he ought to perform ſuch Part of the Disjunctive, that then was poſſible to be performed. Note Reader, a good Caſe to prove the principal Caſe; for inaſmuch as the Rent

(a) Cr. Eliz. 832. Hob. 172. Co Lit. 217. b. 2 Rol. Rep. 213. Plowd. 171. a. 2 Sand. 368. 10 Co. 106. b.

(b) Cr. Eliz. 832. Hardr. 91, 94. Ley 79. 1 Ventr. 148. 2 Sand. 369. Palm. 482. 1 Bulſtr. 175. 3 Bulſt. 328. Godb. 363, 449, 450. 1 Jones 309.

(c) 27 H. 8. 18. b.

(d) Co. Lit. 8. b. 214. a.

(e) Plow. 289. a. 1 Rol. 450. Antea 22. a. Br. Condition 47. Bridg. 40.

Rent was to be paid Yearly during the Term at ſuch Feaſts in certain to the Leſſor, or his Succeſſors, the Leſſee at the ſame Feaſts ought to pay the Rent to that Perſon which then might receive it, and that is the Leſſor himſelf, and the Leſſor cannot chooſe to pay it at the ſame Feaſts to him or his Succeſſors as long as the Leſſor lives, for it is not poſſible that he who is not then *in rer' natura* ſhould receive it.

2. It was reſolved, That altho' the Words of the Stat. of 32 *H.* 8. *c.* 34. are general ("As all other Perſons being "Grantees or Aſſignees to or by any other Perſon or Perſons, "*&c.* ſhall and may have like Advantage, as the Leſſors or "Grantors themſelves, *&c.* ought, ſhould, or might have had "or enjoyed at any Time or Times, *&c.* Yet the Grantee or Aſſignee by Fine ſhall not take Advantage of a Condition without *(a)* Attornment. For when a Stat. ſpeaks of an Aſſignee, *&c.* it is to be intended of ſuch compleat Aſſignee, who has all the Ceremonies and Incidents requiſite by the Law to ſuch Aſſignee, and not to take away any Ceremony or *(b)* Circumſtance, which the Law requires, nor to do any Thing contrary to the Com. Law; as it is agreed in 28 *H.* 8. 28. That where the Stat. of 27 *H.* 8. *cap.* 10. of Uſes, enacts that the actual Poſſeſſion ſhall be adjudged according to the Uſe, yet it ought to have the Circumſtance which is requiſite by the Com. Law, *ſcil.* actual Entry in Fact. So it is agreed in *(c)* 4 *E.* 4. 31. *a. b.* it was ordained by the Stat. of *(d)* 1 *E.* 4. that all Inquiſitions taken before the Sheriff in his Turn, or County, ſhould be delivered to the Juſt. of Peace at the next Seſſions; to whom they ſhould make Proceſs on them, as on Inquiſitions taken before themſelves: A Preſentment was made in the Turn on the Stat. of Liveries, which was delivered according to the Stat. to the Juſt. of Peace at the next Seſſions who proceeded thereon; and it was held that it was againſt Law, for the Stat. of 1 *E.* 4. is intended of lawful and ſufficient Preſentments in Law, and not of Preſentments which the Sheriff cannot take by the Com. Law. So it is held in 22 *E.* 3. *Corone* 276. that the Stat. of *Weſt.* 2. *cap.* 12. ſhall not make a Monk who was appealed and acquitted capable of Damages, for he was diſabled by the Com. Law. And it was ſaid, that on the ſame Reaſon it was adjudged in *Duke*'s Caſe, That the Conuſee of a Fine before Attornment ſhould not take *(e)* Benefit of a Condition by the ſaid Statute of 32 *H.* 8.

3. It was reſolved, That although Doctor *Bellay* himſelf could not have taken Advantage of the Condition becauſe he had not Attornment; yet foraſmuch as by the Fine the Reverſion and the Rent was veſted in him, which he has granted to his Son, to whom the Tenant has attorned, for this Cauſe he ſhall take *(f)* Advantage of the Condition, which his Father could not, becauſe he wanted Attornment, which his Son has. And the Words of 32 *H.* 8

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(a) Co. Lit. 215. a 309. b. Hob. 178.

(b) Dyer 28. pl. 182.

(c) 9 Co. 26 b.
(d) 2 Inſt. 190, 191.
9 Co. 26. b. Sciant Cor. 85. b. 86. a. b.

(e) Co. Lit. 215. a 309. b. Hob. 178.

(f) Cr. El. 832.

"That the Grantees or Assignees shall and may have and en-
"joy like Advantage, &c. as the said Lessors or Grantors
"themselves, &c. if the Rev'n had not come to the Hands
"of our Sovereign Lord, &c. are well satisfied; for here in this Case is a complete Grantee and Assignee; and therefore he shall take the same Benefit as the Abbot himself, who made the Lease, might. Also it was resolved, that these Words *(as the said Lessors or Grantors, &c.)* should not be intended of the immediate Grantor of the Reversion, but of any Grantor before, who might have taken Benefit of the Condit.

4. This Difference was taken and agreed for Law, that is to say, between an express Attornment of the Party, and an Act which amounts in Law to an Attornment: For if a Lease for Life, or for Years be made rendering Rent, &c. and afterwards the Rev'n is granted, &c. to *B.* by Fine, and before Attornment *B.* disseises or ousts the Lessee, and enfeoffs *C.* the Lessee re-enters, it shall not amount to an Attornment in Law to make Privity to *C.* that he may distrain for the Rent, for he shall not be in a better Case than his Feoffor was, as it was adjudged in the Com. Pleas, *M.* 36 & 37 *El. Rot.* 420. in *(a) Owsey*'s Case. But otherwise it is if the Lessee had expressly attorned to the Feoffee. So *Popham* Chief Justice said it was adjudged in *(b) Knottisford*'s Case, with whom he was of Counsel 30 Years past; That where the Conusee by Fine of a Rev'n before Attornment, bargained and sold the Rev'n to another by Deed indented and inrolled according to the Statute, That the Bargainee should not distrain for the Rent reserved on the Lease; for he should not be in a better Condition than he who made the Grant to him, for *(c) nemo potest plus juris in alium transferre, quam ipse habet*; but if the Conusee had had an express Attornment, then the Bargainee should distrain without any Attornment. But if the Conusee of a Rev'n by Fine dies without Heir before Attornment, by which the Estate which he has escheats to the Lord, the Lord in that Case should distrain without Attornment, as *Litt.* 131, 132. & 39 *H.* 6. 2. & 38. *Prisot* holds, yet the Conusee himself could not; and the Reason is, because the Lord by Escheat has lost his Seigniory, and he doth not claim as Heir or Assignee to the late Conusee, but by Virtue of his Seigniory paramount.

Note Reader, otherwise it is, as it hath been said, if the Conusee before Attornment bargains and sells the Reversion by Deed indented and inrolled; for the Statute of 27 *H.* 8. executes the Possession in the same Quality, Manner, Form, and Condition as he had the Use; and when the Conusee before Attornment bargains and sells the Reversion, the Use which is derived out of his Estate,

(a) Owsey's Case Mich. 36 & 37 El. 6 Co. 68. b. Cr. El. 264, 354. Owen 23. 2 Anders. 15.

(b) Cr. El. 832. 6 Co. 68. b.

(c) 4 Co. 24. b. 6 Co. 57. b. 68. b. 8 Co. 63. b. Co. Lit. 309. b.

Lit. lib. 3. tit. Attornment.

1 Anders. 15. Cro. El. 285, 673. 3 Leon. 103, 104. 4 Leon. 34. 50. Vaugh. 36, &c. 49, 50.

which wanted Attornment, ought to be of the ſame Nature and Quality as that was out of which it was derived: But if the Bargainee in ſuch Caſe had obtained an expreſs Attornment, it is ſufficient: And ſo obſerve theſe good Differences. And in this Caſe it was ſaid by *Popham* Ch. Juſt. and not denied by any, That if the Leſſor in the Abſence of the Leſſee enters as it is aforeſaid, and makes a Feoffment in Fee, and the Leſſee re-enters, altho' it amounts to an Attornment in Law, yet without Notice given of this Feoffment to the Leſſee, the Feoffee ſhall not make a Demand of the Rent reſerved on the Leaſe for Entry for Condition broken: For true it is that the Feoffee may diſtrain or have an Action of Debt for the Rent, or have an Action of Waſt in ſuch Caſe, for in his Avowry or Declaration he ought to alledge the Feoffment whereof the Leſſee had Notice: But if he may demand the Rent on the Condition without Notice, it is not poſſible that the Leſſee ſhould know to whom he ſhould pay his Rent to ſave his Term, nor have Notice of the Feoffment in ſuch Caſe before he has forfeited his Term: So if the Leſſor bargains and ſells the Reverſion by Deed indented and inrolled, the Bargainee (although there needs no Attornment) ſhall never take Benefit of a Condition on a Demand of Rent, without giving Notice to the Leſſee of the Bargain and Sale; for although the Bargain and Sale by Deed indented and inrolled be of Record; yet foraſmuch as it may be inrolled in ſo many Courts in ſo ſecret a Manner, the Law will not compel all the Farmers in *England*, who have conditional Leaſes to make every ſix Months ſuch infinite Search to ſave their Terms; but the Law for the Salvation of the Intereſt and Term of the Leſſee, will compel the Bargainee, who is to take Benefit of the Condition to give Notice thereof to the Leſſee who is altogether a Stranger to it.

8 Co. 92. a. Cr. Jac. 146, 193, 476. 2 Rol. Rep. 143. Bridg. 130. 1 Mod. Rep. 87. 4 Co. 70. b. 2 Co. 68. b. Cart. 93, 172. Co. Lit. 215. b. Hob. 178. Latch. 15. Cr. Car. 392. Godb. 162. Palm. 207, 210, 434. Poph. 165.

Note Reader, The Leſſee, as *Littleton* ſaith, ſhall not be by the Law miſconuſant of Feoffments made on the ſame Lands, that is to be intended as to Diſtreſs, Action of Debt, and Action of Waſt, in which Caſes the Law will compel the Feoffee in his Avowry and Declaration to give Notice as has been ſaid. But *Littleton* is not to be intended, as to Demand of Rent to have Advantage of a Condition without Notice thereof given, as is aforeſaid. And *Littleton* there ſaith, that in ſuch Caſe the Feoffee after Regreſs made by the Leſſee ſhall have an Action of Waſt: But neither *Littleton*, nor any of the Books in 18 *E.* 3. 47. *Robert Bowſer's* Caſe, 46 *E.* 3. 30. *Pomeray's* Caſe, 34 *H.* 6. 6. 5 *H.* 5. 12. nor any other Book ſpeak of Demand and Entry upon the Condition broken.

Lit. lib. 3. cap. Attornment fol. 130. Lit. Sect. 576. Co. Lit. 318. b.

Trin. 43 Eliz. *Rot.* 406.

In the Common Pleas.

WADE's *Case.*

IN Replevin between *Foxcroft* Plaintiff, and *Wade* Defendant, the Case was; *Foxcroft* Copyholder in Fee surrendered to the Use of *William Wade* the Defendant's Father and his Heirs, on Condition that if the Plaintiff should pay to the said *William Wade* 250 *l. legalis monetæ Angliæ* the 24th Day of *Nov. &c. ad dom' suam mansional', &c.* that then the Surrender should be void. And a Tender and Refusal was alledged, and Issue was taken on the Tender to the said *William Wade:* And the Jurors gave a special Verdict, *scil.* That *Foxcroft* the 24th Day of *Novemb. inter horas* 7 & 8 *ante meridiem ejusdem diei deliberavit cuidam M. Filio suo, & cuidam A. S.* 250 *l. in monet'* (*Anglice* Money) *sc. quinque solid' de Hispanico argento* (*Anglice* in Spanish Silver) *& duo duplices auri selopi* (*Anglice* two double Pistolets) *& resid' præd' summæ* 250 *l. fuit in bona legal' monet' Angl', ac etiam deliberavit præfat. M. & A.* 34 *s. legalis monetæ Angliæ*; and that the Plaintiff required them and each of them to tender and pay the said 250 *l.* according to the Form and Effect of the Condition. And it was further found, that they *inter horas* 9 & 12 *ante meridiem ejusdem diei super quandam mensam ibidem obtulerunt* 250 *l.* And that *Will. Wade* there then counted 244 *l.* but in Respect of the said 5 *s.* in *Spanish* Money, and the said two Pistolets, he refused to receive the Money; upon which *M.* and *A.* offered the said 34 *s.* in Silver to the said *W. Wade*, requiring him to take Silver in Lieu of the Pistolets and *Spanish* Money which also he refused; and afterwards *circa horam duodecimam*, they tendered to the said *William Wade* the Residue in Silver, *French* Crowns and Angels, current Money of *England*, which he in like Manner refused to accept: And afterwards *ante occasum solis ad ostium domus*, they offered to him to pay the 250 *l.* all

Co.Ent.657. pl. 10.

in Silver being in Bags, but did not ſhew any Part of it, and he ſaid, that *recip' vellet, ſed non recepit.* And at Sun ſet, the ſaid *A.* entered into the Houſe, and *ſup. quand' menſam depoſuit præd'* 250 *l.* being in Bags, *ſed ill' extra baggas præd' non oſtendit, quodq; præd' W. Wade diffcrebat recipere præd'* 250 *l. uſq; poſt occaſum ſolis, & adtunc requiſitus ad recipiend' recuſavit, allegando,* that the Sun was ſet, *& ea de cauſa recipere noluit:* And if on the whole Matter there was any good Tender or not was the Queſtion. And in this Caſe 4 Points were reſolved:

1 Point. (*a*) Co. Lit. 202. a. 7 Co. 28 b. Cr. El. 14. Moor 122. 10 Co. 129.

1. Although the laſt Time of Payment of the Money by Force of the Condition *(a)* is a convenient Time, in which the Money may be counted before Sun ſet, yet if the Tender be made to him who ought to receive it at the Place ſpecified in the Condition, at any Time of the Day, and he refuſe it, the Condition is for ever ſaved, and the Mortgagor or Obligor, *&c.* needs not to make a Tender of it again before the laſt Inſtant, for by the expreſs Words of the Condit. the Money is to be paid on the Day indefinitely, and a conven' Time before the laſt Inſtant is the extreme Time appointed by the Law, to the Intent that the one ſhould not prevent the other, the one being ſometimes there, and the other not, and the other being ſometimes there, and not the other; and therefore the Law appoints the extreme Time of the Day, to the Intent that both Parties may certainly meet together; for the Law which always requires Convenience, and is grounded on the Experience of the Sages, will not compel any of the Parties to make an Attorney, or to repoſe Confidence or Truſt in any other to pay it for him when he will do it himſelf, (for *non temere credere eſt nervus ſapientiæ.*) But if both the Parties meet together any Time of the ſame Day, and the Obligor or Mortgagor, *&c.* makes a †Tender in the Place, *&c.* to the Mortgagee, *&c.* and he refuſes it, the Penalty is for ever ſaved, and he need not make a new Tender by a convenient Time before the laſt Inſtant. And ſo on theſe Reaſons you will better underſtand your Books 19 *H.* 6. 76. 20 *H.* 6. 32. 22 *H.* 6. 46. 7 *H.* 7. 7. 6 *H.* 7. 2. 32 *H.* 8. *Br. Condition* 192 *Plow. Com. Kidwelly's* Caſe 70. and *Hill* and *Grange's* Caſe 173. 4 *E.* 6. *Br. Tender* 41. 19 *Eliz. Dier* * 354.

† Co. Lit. 202. a.

*Co. Lit. 211. a. 3 Keb. 19. 1 Rol. 449. 2 Bulſtr. 145. 13 Co. 2. 2 Keb. 816. 8 Co. 92. Cr. El. 298, 299. Dyer 354. pl. 32. 3 Bulſt. 326. 1 Mod. Rep. 88. Carter 93.

2 Point. (*b*) Co Lit. 207. a. b. 208. a. Dyer 82. b. (*c*) Co. Lit. 207. a Dav. 19. b.

2. Where the Condition was, that he ſhould pay to him 250 *l. legalis monet' Angliæ*; it was reſolved that the ſaid *Spaniſh* Silver ſo tendered was lawful *(b)* Money of *England*, for it was made current by Proclamation in the Time of the Reigns of *Philip* and *Mary:* Alſo that *French* Crowns were current and lawful Money of *England* by Proclamation alſo. And the King *(c)* by his abſolute Prerogative may make any foreign Coin lawful Money of *England* at his Pleaſure, by his Proclamation, *quod nota.*

3. That

3. That if a Man tenders more than he ought to pay, it is good, for (*a*) *omne majus continet in ſe minus*, and the other ought to accept ſo much of it as is due to him (*b*) *quando plus fit quam fieri debet, videtur etiam illud fieri quod faciendum eſt. Et in majore ſumma continetur minor.*

4. That where the Plaintiff did tender all the 250 *l.* in (*c*) Bags without ſhewing it, or counting it; it was reſolved that the Tender was good, if the Truth was that there were 250 l. in the Bags: And ſo it has been adjudged in the K's Bench in *Winter's* Caſe; for when the Condition is, that he ſhall pay 250 *l.* the Mortgagor doth all that is requiſite by the Law for him to do, if he provides the Money, and offers it to the Mortgagee in Bags, which is the uſual Manner to carry Money. And then it is the Part of the Mortgagee to count it if he will, or if he will credit the Mortgagor he may accept of it without telling it; then if the Telling it belongs to the Mortgagee, by Conſequence he ought to put it out of the Bags, which is incident to it, for without ſo doing he cannot tell it: And if the Mortgagor puts the Money out of the Bags, yet it is at the Peril of the Mortgagee to look upon it, for perhaps they may be Counterfeits, and yet have a great Shew of good and lawful Money, and alſo it is at his Peril to count it: And if a Man be bound to pay 40000 *l.* at ſuch a Day, if he tenders it in Bags it is ſufficient, for it cannot be counted in one Day. And ſo hereby you will underſtand the better Opinion in 22 *E.* (*d*) 4. 21. And it was ſaid that it was adjudged between *Vane* and *Studley*, that where the Leſſor demanded Rent of his Leſſee according to the Condition of Re-entry, and the Leſſee paid the Rent to the Leſſor, and he received it, and put it in his Purſe, and afterwards in Looking it over again at the ſame Time, he found amongſt the Money that he had received ſome counterfeit Pieces and thereupon he refuſed to carry away the Money, but re-entered for the Condition broken, And it was adjudged that the Entry was not lawful; for when the Leſſor had accepted the Money, it was at his Peril, and after that Allowance he ſhall not take Exception to any Part of it.

(*a*) 4 Co. 46. a. Co Lit. 52. b. 285 a. 2 Co. 68. a. 6 Co. 43 b. 3 Inſt. 109. 1 Bulſtr. 105. 2 Bulſtr. 48.
(*b*) 8 Co. 85. a.
(*c*) Co. Lit 208. a Noy 74.
(*d*) 22 E. 4. 41. a.

Trin. 43 Eliz.

In the Common Pleas.

FOLIAMB's *Case.*

IN an Action of Waſt by *Foliamb* againſt Sir *Will. Bowes* and his Wife, the Plaintiff had an Eſtrepment directed to the Sheriff. And in this Caſe two Points were reſolved.

(*a*) Cr. El. 393, 774. Mo. 622. 2 Inſt. 304, 329. 12 R. 2. Eſtrepement 6.

1. That a Writ of Eſtrepment lies in an Action of Waſt (*a*), as well at any Time before Judgment, as after Judgment and before Execution: For without Queſtion he cannot recover Damages for more than he has contained in his Count, and he cannot aſſign any Waſt made after the Writ purchaſed, for the Words of the Writ are *fecit vaſtum* in the preterperfect Tenſe; and therefore he cannot aſſign Waſt made after the Writ.

2. Where the Words of the Writ are, *Tibi præcipimus, quod ad meſſuagium præd' perſonaliter acceden', totaliter ordinari facias, quod vaſtum ſeu eſtrepamentum de eodem meſſuagio, contra formam Statuti præd' non fiat, pendente placito prædict' indiſcuſſo:* It was reſolved, that the Sheriff by Force of this Writ might reſiſt (*b*) them who would do Waſt. And if he otherwiſe could not, he might impriſon them, and make a Warrant to others to do it; and if it be neceſſary, he might take the *Poſſe Comitatus* to help him. *Quia quando aliquid mandatur, mandatur & omne per quod pervenitur ad illud.* And ſo a Doubt in divers Books, *ſcil.* 4 *E.* 3, 32. 21 *E.* 3. 3. 22 *E.* 3. 2. 6 *H.* 4. 1. *b.* 33 (*c*) *H.* 6. 6. *a.* 14 (*d*) *H.* 7. 7, 8. *F. N. B.* 66. *Y.* & 61. *C. K. L.* well reſolved.

(*b*) 2 Inſt. 299, 329. Bulſt. 200. Hob. 25.

(*c*) Fitz. Eſtrepement 5. Br. Eſtrepem. 6.

(*d*) 14 H. 7. 10. a. Br. Eſtrepem. 9.

Hill.

Hill. 44 Eliz.

In the King's Bench.

Oland's *Case.*

In Treſpaſs by *Oland* againſt *Burdwick* which began in the King's Bench, *Hill.* 37 *Eliz. Rot.* 924. on a ſpecial Verdict, the Caſe was ſuch; A Woman Copyholder of certain Land, *durante Viduitate ſua*, according to the Cuſtom of the Manor ſowed the Land, and before Severance of the Emblements, took Husband. And whether the Husband or the Lord of the Manor ſhould have the Emblements was the Queſtion. And it was adjudged that the (*a*) Lord ſhould have the Emblements; for although at the Time of the Sowing, the Eſtate of the Wife was incertain, and although her Eſtate determin'd by Limitation and not by Condition, either in Fact (as in Caſe of Re-entry) or in Law (as Forfeiture) yet becauſe it determined by the Act of the Leſſee her ſelf, therefore the Lord ſhall have the Emblements, and not the Husband: So if a Woman ſeiſed of Land *durante Viduitate ſua*, makes a Leaſe for Years, and the Leſſee ſows the Land, and afterwards the Woman who made the Leaſe takes Husband, the (*b*) Leſſee ſhall not have the Emblements; for although his Eſtate is determined by the Act of a Stranger, yet he ſhall not be (as to the firſt Leſſor) in a better Condition than his Leſſor was. It is commonly held in our Books, That if a Man leaſes Land at Will, and afterwards the Leſſee ſows the Land, and afterwards the (*c*) Will is determined, that the Leſſee ſhall have the Emblements; but it was agreed that if the Leſſee (*d*) himſelf determines the Will before the Severance of the Corn, he ſhall not have the Emblements, becauſe he has determined his Intereſt by his own Act.

Goldsb. 189, 190. Moor 394, 395. Cr. El. 460, 461.

(*a*) 1 Rol. 726. Co. Lit. 55. b. 2 Bulſtr. 213. 2 Inſt. 81.

(*b*) Goldsb. 189. 1 Rol. 727. Cr. El. 460, 461.

(*c*) Cr. El. 461.
(*d*) Goldsb. 190. 1 Rol. 726. Cr. El. 461. Co. Lit. 55. b.

(a) 3 Keb. 166, 207. Goldsb. 190. 1 Rol. 861. 2 Rol. 807.

If a Man makes a Leaſe at Will, and the Leſſor is (a) outlawed, by which the Will is determined, the King ſhall have the Profits; yet the Leſſee at Will ſhall have the Corn which was ſowed: But if the Leſſee at Will be (b) outlawed, by which the Will is determined, yet the King ſhall have the Emblements. *Vide* 9 *H.* 6. 20, 21. But it was held, If a Leaſe be made to Husband and Wife during the Coverture, and the Husband ſows the Land, and afterwards they are (c) divorced *cauſa præcontractus*, the Husband ſhall have the Emblements, and not the Leſſor; for although the Suit is the Act of the Party, yet the Sentence which diſſolves the Marriage is the Judgment of the Law, & *judicium redditur in invitum*; and therefore the Husband in ſuch Caſe ſhall have the Emblements; but if a Leaſe be made to one until he doth (d) Waſt, and he ſows the Land, and afterwards doth Waſt, he ſhall not have the Emblements, *cauſa qua ſupra*.

(b) 1 Rol. 861. 2 Rol. 807.

(c) Golsb. 190. Moor 395. 1 Rol. 726. Cr. El. 461.

(d) 1 Rol. 726. Cr. El. 461.

Trin.

Trin. 44 Eliz. *Rot.* 501.

In the Common Pleas.

L. P. 1 Ventr. 426

PINNEL's *Case.*

PInnel brought an Action of Debt on a Bond againſt *Cole* of 16 *l.* for Payment of 8*l.* 10*s.* the 11*th* Day of *Nov.* 1600. The Defendant pleaded, that he at the Inſtance of the Plaintiff, before the ſaid Day, *ſcil.* 1 *Octob. Anno* 44. *apud W. ſolvit querenti* 5 *l.* 2*s.* 2*d. quas quidem* 5 *l.* 2*s.* 2*d.* the Plaintiff *(a)* accepted in full Satisfaction of the 8 *l.* 10*s.* And it was reſolved by the whole Court, That Payment of a leſſer Sum on the Day in Satisfact. of a greater, cannot be any Satisfaction for the whole, becauſe it appears to the Judges that by no Poſſibility, *(b)* a leſſer Sum can be a Satisfaction to the Plaintiff for a greater Sum: But the Gift of a Horſe, *(c)* Hawk, or Robe, *&c.* in Satisfaction is good. For it ſhall be intended that a Horſe, Hawk, or Robe, *&c.* might be more beneficial to the Plaintiff than the Money in Reſpect of ſome Circumſtance, or otherwiſe the Plaintiff would not have accepted of it in Satisfaction. But when the whole Sum is due, by no Intendment the Acceptance of *(d)* Parcel can be Satisfaction to the Plaintiff: But in the Caſe at Bar it was reſolved, that the Payment and Acceptance of Parcel before the *(e)* Day in Satisfaction of the whole, would be a good Satisfaction in Regard of Circumſtance of Time; for Peradventure Parcel of it before the Day, would be more beneficial to him than the whole at the Day, and the Value of the Satisfaction is not material: So if I am bound in 20*l.* to pay you 10*l.* at *Weſtminſter*, *(f)* and you Requeſt me to pay you 5*l.* at the Day at *York*, and you will accept it in full Satisfact. of the whole 10*l.* it is a good Satisfact.

Moor 677, 678.

(a) Doct. pl. 267.

(b) Perk. ſect. 749. Co. Lit. 212. b.

(c) 9 Co. 79. a. Perk. ſect. 749. Co. Lit. 212. b. Yelv. 11. 1 Bulſtr. 66. Cr. El. 46, 193. Cr. Jac. 254.

(d) Co. Lit. 212. b. Yelv. 11. Perk. ſect. 749. Dall. 49. pl. 13. Moor 48. Lutw. 466.

(e) Moor 677. Co. Lit. 212. b. Cr. El. 304.

(f) Moor 678. Cr. El. 304. Co. Lit. 212. b.

for the whole: For the Expences to pay it at *York*, is sufficient Satisfaction: But in this Case the Plaintiff had Judgment for the insufficient Pleading; for he did not plead that he had payed the 5 *l.* 2. *s.* 2 *d.* in full (*a*) Satisfaction (as by the Law he ought) but pleaded the Payment of Part generally; and that the Pl. (*b*) accepted it in full Satisfaction. And always the Manner of the Tender and of the Payment, shall be directed (*c*) by him who made the Tender or Payment, and not by him who accepts it. And for this Cause Judgment was given for the Plaintiff.

(*a*) 9 Co. 80. b. Doct. pl. 19. Winch. 76. Stile 263.

(*b*) Doct. pl. 267. Cr. El. 193. Stile 263.

(*c*) Cr. El. 68. 2 Brownl. 107, 108. Stile 239.

See Reader (*d*) 26 *H.* 6. *Barre* 37. in Debt on a Bond of 10 *l.* the Defendant pleaded, that one *F.* was bound by the said Deed with him, and each in the whole, and that the Plaintiff had made an Acquittance to *F.* bearing Date before the Obligat. and delivered after, by which Acquittance he did acknowledge himself to be paid 20 *s.* in full Satisfaction of the 10 *l.* And it was adjudged a good Bar; for if a Man acknowledges himself to be satisfied by (*e*) Deed, it is a good Bar, without any Thing received. *Vide* 12 *R.* 2. *Barre* 243. 26 *H.* 6. *Barre* 37. & 10 *H.* 7, &c.

(*d*) 9 Co. 79. b. Dall. 49. pl. 13.

(*e*) Doct. pl. 267. Co. Lit. 212. b. Dall. 49. pl. 13. Moor 47, 48.

Pasch

Paſch. 1 Jacobi,

In the Common Pleas.

EDRICH's *Caſe.*

BEtween *Edrich* and *Smith* in Replevin, a Caſe was adjudged on the laſt Clauſe of the Statute of 32 *H.* 8. *c.* 37. and the Caſe was ſuch; *A.* ſeiſed in Fee of Land held in Socage, by his Will in Writing deviſed a Rent with Clauſe of Diſtreſs to *B.* for the Life of *C.* and died. The Heir leaſed the Land charged for Life to *D.* the Remainder to *E.* in Fee, the Rent is behind for divers Years in the Life of *D.* *D.* died, and afterwards *C.* died, *B.* diſtrained him in the Remainder for all the Arrearages incurred in the Life of *D.* And whether he ſhould be charged in this Caſe for all the Arrearages by the ſaid Act was the Queſtion. The Branch of which Act as to this Purpoſe conſiſts on two Parts; By the firſt, Action of Debt is given to the Tenant *per auter vie*, after the Death of *Ceſtuy que vie*, againſt the Tenant in Demeſne, (who ought to have paid it when it was firſt due) his Executors or Adminiſtrators. The ſecond is, "And alſo ſhall diſtrain for the ſame Arrearages upon ſuch Lands and Tenements out of which the ſaid Rents or Fee-Farms were iſſuing, in ſuch like Manner and Form as he might or ought to have done, if *Ceſtuy que vie* had been alive. And it was objected, that by a former Part of the Act, which gave Diſtreſs to Executors of Tenant for Life, there the Diſtreſs is given againſt him in whoſe Time the Arrearages incurred due, and all others claiming the Land on- *by or from the ſaid Tenant, by Purchaſe, Gift, or De-* 4 Co. 50. *vent*, in the ſame Manner as the Tenant for Life might have done; ſo that by this Branch, he in the Reverſion or Rem'r ſhall not be charged for the Arrearages incurred in the Life of Ten't for Life, for he in the Rev'n or Rem'r doth not claim *by or from him:* And in this ſame Caſe at Bar the Action of Debt by the firſt Part of the ſaid Branch is given only

10 Co. 68. a. Lit. Rep. 93. Co. Lit. 162. b.

1 Leon. 302.

ly

ly againſt the Tenant who ought to have paid it. his Executors or Adminiſtrators, and not againſt him in Remainder, *&c.* And in that it was ſaid, the Statute has great Reaſon, for otherwiſe he in Reverſion or Remainder would not only be charged by the Statute for the Arrearages (if any ſhould be) which incur in their own Time, but alſo for the Arrearages incurred in the Life of the Tenant for Life, where in the one Caſe or the other he in Reverſion or Remainder was not charged by the Common Law, and the Tenant for Life may leave all the Rent for his Time unpaid, and by that Means charge him in Reverſion or Remainder for all; and the Grantee in this Caſe may have his Remedy againſt the Executors of the Tenant for Life: But it was reſolved and adjudged, That he in Remainder in this Caſe, by the laſt Part of the ſaid Branch ſhould be charged. And the Judges ſaid they ought not to make any Conſtruction againſt the expreſs Letter of the Statute; for nothing can ſo expreſs the Meaning of the Makers of the Act, as their own direct Words, for *Index animi ſermo.* And it would be dangerous to give Scope to make a Conſtruct. in any Caſe againſt the expreſs Words, when the Meaning of the Makers doth not appear to the contrary, and when no Inconvenience will thereupon follow, and therefore in ſuch Caſes, *A verbis legis non eſt recedendum.* And the ſeveral Inditing and Penning of the former Part concerning Diſtreſs given to Executors, and of this Branch, doth argue that the Makers did intend a Difference of the Purviews and Remedies, or otherwiſe they would have followed the ſame Words. And in the principal Caſe all the Land was charged with the Rent, and the Heir held all his Eſtate charged with it; and when he made the Leaſe for Life, the Remainder in Fee, he in Remainder was chargeable, and in this Caſe might have been diſtrained by the Common Law for the Arrearages, but by the Act of God by the Death of *C. D.* was prevented, which Prevention, the ſaid laſt Part of the ſaid Branch has ſupplied and remedied in this Caſe, giving the Grantee Power to diſtrain, as if *Ceſtuy que vie* had been alive. And according to this Reſolution Judgment was entred.

Co. Lit. 162. b.
1 Vent. 92.
2 Sand. 176.
Hard. 342.
Palm. 433.
Owen 117, 118.
10 Co. 86. a.
Wing. Max. 24, 25.
2 Rol. Rep. 246, 278.
March. 37.

Trin.

Trin. 2 Jacobi,

In the King's Bench.

WHELPDALE's *Case.*

IN Debt by *Whelpdale* againſt *Whelpdale*, which began *Hill.* 45 *Eliz. Rot.* 1303. The Plaintiff declared on a Bill obligatory made by the Defendant to the Plaintiff; The Defendant pleaded, *Non eſt factum*; and the Jury found that the Bill was a joint Bill made by the Defendant and another to the Plaintiff; And if on the Matter the Bill mentioned in the Declaration be the Deed of the Defendant, the Jurors prayed the Advice of the Court. And it was adjudged that the Plaintiff ſhould recover. And in this Caſe four Points were reſolved:

1. When two Men are jointly bound in a Bond, although neither of them is bound by himſelf, yet neither of them can ſay; That the Bond is *(a)* not his Deed, for he has ſealed and delivered it, and each of them is bound in the whole. And therefore if they are both ſued and one appears, and the other makes Default, and by Proceſs of Law is *(b)* outlawed, he who appears ſhall be charged with the whole, as appears in 40 *E.* 3. 36. 41 *E.* 3. 3. But in the Caſe at Bar, he might have pleaded in *(c)* Abatement of the Writ, but cannot plead, *non eſt factum.*

2. It was reſolved, that in all Caſes when the Deed is voidable, and ſo remains at the Time of the Pleading (as if *(d)* an Infant ſeals and delivers a Deed, a Man of full Age by *(e)* Dureſs) in theſe and the like the Obligee cannot plead *non eſt factum*, for it is his Deed at the Time of the Action brought, and ought to be avoided by ſpecial Pleading, with Concluſion of Judgment, *ſi Actio*, 1 *H.* 7. 15. *a. b.*

3. When a Bond or other Writing is by an Act of Parliament enacted to be void, the Party who is bound cannot plead *non eſt factum*, but in Conſtruction of Law the Deed is to be avoided by the Party who is bound by it, by Pleading the ſpecial Matter, taking Advantage of the Act of Parliament; For although the Act makes the Bond or other Writing void, yet thereto the Law doth *tacitly* require Order and Manner, which the Obligor ought to follow: As if a Bond be made to a Sheriff againſt the Statute of

(a) 2 Rol. 709. Co. Lit. 283. a. Cr. Jac. 152. Dyer 310. pl. 8. Doct. pl. 260. Sav. 92. 1 Sid. 420.
(b) 1 Jones 442.
(c) 1 Sand. 291. Doct. pl. 260. 1 Sid. 420.
Co. Lit. 283. a. 23 H. 6. 3. a. Cro. El. 494, 544. 1 Ven. 34. Lutw. 695, 696.
(d) Plowd. 66. b. 35 H. 6. 18. a. Moor 43. 2 Inſt. 483. Doct. pl. 259. 14 H. 8. 28. a. 1 H. 7. 15. b.
(e) 14 H. 8. 28. a. 1 H. 7. 15. b. 2 Inſt. 483.
(f) Doctrin. pl. 259, 260, 262. Hob. 72. 14 H. 8.

of 23 (*a*) *H.* 6. *cap.* 10. or to one againſt the Stat. of 13 *El. cap.* 8. of Uſury, in theſe and other like Caſes the Obligor ought to plead the ſpecial Matter, with Concluſion of Judgment, if Action; and not to plead *non eſt Factum*, and therewith agrees 7 (*b*) *E.* 4. 5. *b.* 7 *E.* 6. *Br. non eſt Fact* 14. againſt the Opinion of *Mountague*, *Plow. Comm.* in *Dive & Manningham*'s Caſe. In all Caſes when the Bond was (*c*) once his Deed, and afterwards before the Action brought becomes no Deed, either by Raſure, or Addition, or other Alteration of the Deed, or Breaking off the Seal; in this Caſe, although it was once a Deed, yet the Defendant may ſafely plead *non eſt Factum*, for without Queſtion at the Time of the Plea, which is in the preſent Time, it was not his Deed, 36 *H.* 8. *Dier* 59. In an Action of Debt on a Bond againſt *Hawood*, the Defendant pleaded *non eſt Factum*, and before the Day of Appearance of the Inqueſt (*d*), Rats did eat the Label by which the Seal was fixed, by the Negligence of the Clark in whoſe Cuſtody it was, the Juſtices charged the Jury, that if they ſhould find that it was the Deed of the Defendant at the Time of the Plea pleaded, that they ſhould give a ſpecial Verdict and ſo they did: But if one commits Waſt, and before any Action brought, the Leſſee repairs, and afterwards the Leſſor brings an Action of (*e*) Waſt, there the Action is not maintainable, becauſe the Jurors ought to view the Waſt. But the Defendant in the ſame Caſe ought to plead the ſpecial Matter, and cannot plead that he did no Waſt, for the Entry is in the preterperfect Tenſe, *ſcil. quod non fecit vaſtum*, and therewith agrees 10 *Eliz. Dier* 276. and ſo a good Diverſity; and the *Quære* 2 *Mar. Dier* (*f*) 112. were reſolved.

And if a Bond be delivered to another, to the (*g*) Uſe of the Obligee, and it is tendered to him, and he refuſes it, now the Delivery has loſt its Force, and the Obligee can never after agree to it; and therefore the Obligee may ſay it is not his Deed, againſt the Opinion in 1 *Eliz.* 167. So if a Bond be made to a Feme-covert, and the Husband diſagrees to it, the Obligor may plead *non eſt factum*, for by the Refuſal, the Bond loſt its Force, and became no Deed. And ſo the diſagreeing Opinions in 14 *H.* 8. 28. *a. Dive* and *Manningham*'s Caſe 66. 1 *H.* 7. 15. *a. b.* 1 *Eliz. Dier* (167. *a.* and other Books well reconciled.

(*a*) Hob. 72, 166. 3 Co. 59. b. Br. non eſt fact' 14. 7 E. 4. 5. b. Stile 234. Plowd. 66. b. Doct. pl. 263. 1 Ven. 85. 2 Sand. 155.

(*b*) 3 Co. 59. b. Br. non eſt fact. 14. 10 E. 0. 100. b. Fitz. Der. 80. Plow. 66 b. 68. a. b. Dyer 120. pl. 8.

(*c*) 11 Co. 27. a. Sav. 71. Dall. 33. pl. 21. 105. pl. 50. Doct. pl. 259. 260. Cr. El 120, 627, 800. Ow. 8. 2 Bulſt. 247. Dyer 112. pl. 50. 12 Co. 16. Moor 30.

(*d*) Doct. pl. 262. 1 Rol. Rep. 40. 2 Bulſtr. 247. Dy. 59. pl. 12, 13.

(*e*) Co. Lit. 53. a. 283. Doct. pl. 199. Dy. 276. pl. 51. 2 Rol. 682.

(*f*) Dyer 112. pl. 50. Doct. pl. 260.

(*g*) 3 Co. 26. b. Doct. pl. 260, 261. Cr. El. 54. 1 And. 4. Dy. 167. pl. 14, 15, &c. 2 Leon. 100, 111. N. Benl. 75. pl. 117.

(*h*) Dyer 167. pl. 14, 15, &c.

Mac

Mich. 2 Jacobi.

In the King's Bench.

LONG's *Caſe.*

INquiſitio indentata capta apud Coſſam *in Com. præd'*, 5. *die* Octobr', *anno Regni Dominæ* Eliz. *Dei gratia* Angliæ, Franciæ, & Hiberniæ *Reginæ, fidei defenſor', &c. triceſimo ſexto, coram* Willielmo Snelling *coronat. Dominæ Reginæ infra libertat. dict. Domin. Regin. villæ ſuæ de* Coſſam *præd', ſuper viſum corporis* H. Long *armig. ibid. exiſten. mortui per Sacrament.* 12. *Jurat. exiſt. præſentat'; quod quidam* Henricus Danvers *nuper de* C. *in Com.* E. *miles*, C. D. *nuper de* C. *præd', in dicto Com.* E. *miles*, G. L. *nuper de* Colkidge *in Com.* W. *Yeoman*, & R. P. *nuper de* L. *in dict. Com.* W. *Yeoman, &c. timorem Dei præ oculis ſuis non habentes, ſed inſtigatione diabolica ſeducti, quarto die* Octobr', *anno Regni dict. Domin. Regin. nunc triceſimo ſexto ſupradict', inter horas undecimam & duodecimam ejuſdem diei, apud* Coſſam *præd', in dict. Com.* Wilts, *vi & armis*, viz. *gladiis, pugionibus, armacudiis & torment', in dict.* Henricum Long, *in pace Dei & dict. Domin. Regin. adtunc eodem* 4. *die* Octobr', *anno triceſimo ſexto ſupradict', apud* Coſſam *præd. exiſten', inſult. fecerunt, & prædictus* H. D. *quoddam tormentum* (*vocat.* a Dagge) *ad valentiam* 6s. 8d. *cum pulvere & pellet. plumbeo, Anglice dict'*, charged with Powder and a Bullet of Lead, *quod idem* H. D. *tunc*, viz. *dict. quarto die* Octob', *anno triceſimo ſexto ſuprad', apud* Coſſam *præd', in manu ſua dextra habuit & tenuit, in & ſuper ipſum* H. Long *adtunc eod' quarto die* Octob. *anno triceſ. ſexto ſuprad', apud* Coſſam *præd', in dict. Com.* Wilts, *felon. voluntar'*, & *ex malicia ſua præcogitata exoneravit, Anglice* did diſcharge, *dans eid.* H. Long *adtunc apud* Coſſam *præd', cum pellet. plumbeo præd', ſic extra torment. præd', per ipſu' emiſſo, unum vulnus mortale, in & ſuper anterior' part' corporis ipſius* H. Long, *ſubter ſiniſtr' mamill' ipſius* H. Long, *totalit' penetrans in & per corp' dict'* H. Long: *De quo quia' vulnere*

Wilts. Indictment.

1 Bulſtr. 203.

vulnere mortali, idem H. L. *adtunc eod' quarto die* Octob. *anno* 36. *ſuprad', apud* Coſſam *præd. inſtanter obiit. Et quod præd.* C. D. *miles*, G. L. &c. *dict. quarto die* Octob. *anno* 36. *ſupradict', ac inter horas præd. ejuſdem quarti diei, apud* Coſſam *præd', in dict. Com.* Wilts. *felonice, & ex malitiis ſuis præcogitat. fuerunt præſentes, abbettantes, procurantes, comfortantes, & manutenentes dict.* H. D. *ad feloniam & murdrum præd', modo & form. præd. felonice faciend. & perpetrand', contra pacem dict. Domin. Regin. nunc, coron. & dignitat. ſuas. Et ſic Jurator. præd', dicunt ſuper ſacrament. ſuum præd', quod præd.* H. D. C. D. G. L. &c. *dict.* H. L. *eodem* 4. *die* Octob. *anno* 36. *ſuprad', apud* Coſſam *præd. in dict. Com.* Wilts. *felonice, voluntarie, & malitiis ſuis præcogitat. felonice interfecerunt & murdraverunt, contra pacem dict. Domin. Regin', coron. & dignitat. ſuas: Et ulterius Juratores præd. dicunt ſuper ſacrament. ſuum præd', quod immediate poſt felon. & murdrum præd. in forma præd. commiſſ. iidem* H. D. C. D. G. L. &c. *fuger', & ſe retraxer. pro felonia & murdro præd'. Ac quod ipſi, aut eorum aliquis, tempore feloniæ & murdr. præd. in forma præd. commiſſ. nulla habuerunt bona aut catalla, terr', aut tenementa, ad notitiam Jur' præd'. In cujus rei teſtimonium tam Jurator. præd', quam præd. coronator', die & anno prius ſuprad', alternatim huic inquiſitioni ſigilla ſua appoſuer', & quilibet eorum appoſuit.*

Upon which Indictm. the ſaid *H. D.* was outlawed, and brought a Writ of Error, and divers Errors were aſſigned in

1 Exception. the Indictm. 1. becauſe in the beginning of the Indictm. it is alledged, that the Indictm. was taken before *W. S. Coron. Domin. Regin. infra libertat. dict. Domin. Regin. villæ ſuæ de* Coſſam *prad', ſuper viſum corporis*; and it is not alledged

(*a*) Poph. 208. Kelw. 89. pl. 9. to what Places the ſaid Liberty doth extend, nor what Part, or nothing of the Town of *Coſſam* be within the Liberty; and ſo it doth not appear that the Coroner had Juriſdiction in the Place where the Inquiſition was taken, nor where the Murder was committed, nor where the dead Body lay, for all is alledged by the Indictm. to be at *Coſſam*; and Indictm.

(*b*) Cr. Jac. 588. 5 Co. 34. b. 35. a. Br. Count. 54, 58, 63. 8 H. 7. 12. a. Plowd. 84. a. 193. a. 202. b. 3 E. 4. 21. a. b. 38 H. 6. 1. a. 8 Co. 57. a. 2 Bulſtr. 77, 78. Co. Lit. 303. a. 2 Sid. 175. 4 Co. 44. b. of Felony which are as Counts (*b*) and Declarations for the King againſt the Parties for their Lives, ought to have Certainty expreſſed in the Record of the Indictm. and ſhall not be ſupplied or maintained by Intendm. or Argum. For if the Counts between Party and Party for Land or Chattels ought to have two Things, *ſcil.* Truth and Certainty, as it is held in *Plow. Comm.* 84. *a.* & 202. *b.* 5 *E.* 4. 21. in Debt, 3 *H.* 6. 1. in *Forcible Entry.* 38 *H.* 6. 35. 9 *H.* 6. 18. becauſe the Counts are the Foundations of the Suits, to which the Party ſhall anſwer, and on which the Judges ſhall adjudge, *a fortiori* Indictm. principally thoſe which concern the Life of a Man, and which are the King's Counts, to which the

Party

Party ſhall anſwer, and on which the Court ſhall adjudge for his Life, ought to have full and preciſe Certainty, and ſhall not be taken by Argument; as appears 2 *E.* 3. 31. 18 *Aſſ. p.* 15. 29 *Aſſ.* 45. 2 *E.* 3. 28. *per Scrope*, 27 *Aſſ.* 73. 38 *Aſſ.* 11, 12. 47 *E.* 3. 17; 7 *H.* 6. 42. 8 *E.* 4. 3. 3 *H.* 7. 5. And becauſe it is not expreſſed in the Indictm. that *Coſſam* was within the Liberty of *Coſſam*, for this Cauſe the Indictm. was incertain and inſufficient. To which it was anſwered and reſolved by the Court, that the Indictm. notwithſtanding this Exception was ſufficient; for true it is that the Rule of Law is, that Indictm. ought to be certain: But there are 3 Manner of Certainties; 1. To a common Intent; 2. To a certain Intent in general; 3. To a certain Intent in every Particular: The firſt Intent is ſuffic. in (*a*) Bars which are to defend the Party and excuſe himſelf: The ſecond is required in Indictments (*b*), Counts, Replications, &c. becauſe they are to accuſe or charge the Party; the third is rejected in Law, for (*c*) *nimia ſubtilitas in jure reprobatur, & talis certitudo certitudinem confundit*: And in this Caſe at Bar there is a ſuffic. certain Intendment in general, that *Coſſam* is within the Liberty of *Coſſ.* but peradventure the Liberty may reach beyond the Town, but that the Town it ſelf ſhould be preſumed to be out of the Liberty of the Town is a ſtrained and captious Intendm. which the Law will not allow: And ſo Sir *J. Pop.* Ch. Juſt. ſaid it was reſolved in the ſame Point in the Caſe of *Lewes* in the County of *Suſſex*; and there the Indictment was, *Inquiſitio capta apud* Lewes *coram Coronatore rapæ ſuæ de* Lewes, and adjudged good in Law.

The ſecond Objection was, That whereas the Indictment was, *Quod prædictus* H. D. *quoddam tormentum, vocatum* a Dagge, *ad valentiam* 6 s. 8 d. *cum pulvere, & pelletto oneravit*, &c. *in & ſuper ipſum* Henr. Long *adtunc*, &c. *felonice, voluntarie, & ex malitia ſua præcogit. exoneravit, dans eidem* Henr. Long *adtunc*, &c. *eum pellet' plumbeo*, &c. *unum vulnus mortale ſuper anteriorem partem corporis ipſius* H. L. *ſubter mamillam*: It was objected, that this Word (*Mamillam*) is a Word inſenſible, being no *Latin* Word, for the *Latin* Word was (as it was ſaid) *Mammilla*, with a double [*m*:] And it was ſaid, that falſe *Latin* ſhall abate Writs, and quaſh Indictments, becauſe he who proſecutes may purchaſe a new Writ, and frame a new Indictment. (*d*) But otherwiſe it is of Grants and Deeds, for the Party cannot have new when he will. And *Hill.* 28 *Eliz. Vaux's* Caſe was cited, where the Count in Appeal was held inſufficient by Reaſon of the Word *burgatiter*, (*f*) where it ſhould be *burglariter*; to which it was anſwered and reſolved by the Court: 1. That falſe *Latin* ſhall not quaſh an Indictment, not abate any Count, for although an original Writ ſhall abate for falſe *Latin*, as it is held (*g*) 9 *H.* 7. 16. *b.* 2 *H.* 4. 8. *a.* 44 *E.* 3. 18.

The 1ſt Object. anſwered.

(*a*) Doct. pl. 58. 195. Plow. 26. a. b. 56. a. 8 Co. 57. a. 2 Bulſt. 77. Co. Lit. 303. a.
(*b*) Cr. Jac. 588. 4 Co. 44. b. 5 Co. 34. b. 35. a. 8 Co. 57. a. Plowd. 84. a. 193. a. 202. b. Br. count 54, 58, 63.
3 H. 7. 12. a. 3 E. 4. 21. a. b. 38 H. 6. 1. a. 2 Bulſt. 77, 78. Co. Lit. 303. a. 2 Sid. 175.
(*c*) Wing. Max. 26. 4 Co. 5. b. 41. b. 3 Bulſt. 63.
2 Objection.
(*d*) Cr. El. 137, 231. 10 Co. 126. a. Yelv. 95.
(*f*) 4 Co. 39. b. 11 Co. 32. a. Cr. El. 920. Doct. pl. 84. Hale's Pl. Cor. 84, 207.
(*g*) 8 Co. 159. b. Br. faux lat. 58. 2 Vent. 173. Br. amendm. 62. Br. obligat. 71. 2 Sand. 39.

The 2d Object. anſwered.

10 *E.* 3. 1. & 553. Yet judicial Writs or a Fine ſhall not be impeached for falſe *Latin*, as it is held 9 *E.* 3. 467. The ſame Law of an Indictment; as if in an Indictment it be *præfato Reginæ* where it ſhould be *præfatæ Reginæ*, or *præfata Regi* for *præfato Regi*, or the like, foraſmuch as the Word is *Latin* and ſignificant; and altho' it be not true *Latin*, the Indictm. for ſuch Incongruity ſhall not be quaſhed

10 Co. 133. a. But if the Word be not *Latin*, nor allowed by the Law, as *vocabul' artis* (for every Art and Science has *propr' vocabula artis*) but is inſenſible, there if it be in a Point material, it makes

4 Co. 39. b. the Indictm. inſuffic. as *burglaria*, *burglariter*, *murdrum*, *felonice*, and the like are *vocabula artis*, known to the Law, and therefore if ſuch Words, or the like, are miſtaken in an Indictment, ſo that in a material Place a Word inſenſible, which is not *Latin*, nor any Word known in Law, it makes the Indictment vicious and inſufficient, as *murdredum* for *murdrum* or *burgariter* for *burglariter*, *feloniter* for *felonice*. But in

4 Co. 39. b. 42. a. the Caſe at Bar it was reſolved, that *mamilla* with a ſingle [*m*] is as good *Latin* as *mammilla* with a double [*m*], as *defamo* and *diffamo*, *definitio* and *diffinitio*. Alſo *Poph.* Chief Juſtice, *Gawdy*, *Yelvert.* and *Williams* held, that theſe Words *ſuper mamillam* were abundant, and more than were neceſ-

4 Co. 42. a. ſary, and therefore if *mamilla* was inſenſible, and no *Latin*, yet it doth not make the Indictment vicious: For it was held by them. that *ſuper anteriorem partem corporis* was certain

4 Co. 42. a. enough and ſufficient; for *corpus* in an Indictment (which is found by Lay-people) is to be intended of the Trunk of the Body, between the Neck and the Thighs, which is the uſual and vulgar Meaning of the Body: So it was reſolved, *Q. d' ſuper caput*, or *ſuper faciem*, or *in dexteriori parte corporis*, or

4 Mod. 290. Salk. 59, 60. Comb. 293. Cr. Jac. 95. *in ſiniſtra parte corporis*, or *ſuper ſiniſtr' manum*, or *ſuper dextram manum*, or *dextrum* or *ſiniſtrum brachium*, &c. or *in pectore*, or *ventre*, are certain enough and ſufficient. But *ſuper brachium*, or *ſuper manum*, or *ſuper latus*, &c. without ſaying *dextr'* or *ſiniſtr'* is not ſufficient, becauſe in ſuch Caſes the Part of a Man in which the Wound is, is not certain.

The 3d Object. Another Exception was taken, becauſe in the ſaid Indictment it was ſaid, *dans eidem* Henr. Long, &c. *unum vulnus mortale*, &c. where it ought to be *unam plagam*, which is the Word uſed in all Indictments, and that *vulnus* ſhould not be uſed in Indictments no more than *ictus*, which alſo ſignifieth a Stroke: But this Exception was diſallowed *per totam Curiam*, for *plaga* and *vulnus* are *ſynonyma*, & *idem ſignificant*, although *plaga* is the more uſual Word in In-

The 3d Object. anſwered. * 4 Co. 42. a. Godb. 65. 66. Stanf. Cor. 79. a. 2 Inſt. 318. dictments. Further Exception was taken, becauſe the Length or * Depth of the Wound was not ſhewed,

The 4th Object. which ought to be in every Indictment of Death, for

this

this Cauſe the Indictment was inſufficient. But this Exception was diſallowed *per totam Curiam*, for the Length and * Depth of the Wound ought to be alledged, to the Intent that it may appear to the Court that the Wound was mortal, ſo that it may appear to be the Occaſion of the Death; But in this Caſe the Wound was through the whole Body. *ſcil. totaliter penetrans, & per totum corpus*, ſo that it was apparent to be mortal; and in ſome Caſes the Dimenſions cannot be alledged, *ſcil.* when a Member, as the Knee, or the Hand, or the Foot, or the Head, &c. are cut off, there any of the ſaid Dimenſions cannot be ſhewed. So in the Caſe at Bar. *Vide Trin.* 28 *Eliz. Heydon*'s Caſe agrees with the Reſolution in this Point. Another Exception was taken, becauſe the Indictment was, *dans eidem* Henrico Long, *&c. cum pelletto plumbeo præd', &c. vulnus mortale, &c. totaliter penetrans in & per corpus præd'* Henr' Long: And becauſe *penetrans* ought of Neceſſity to agree with *vulnus*, and not with *pelletto*, not only becauſe *vulnus* is the laſt Antecedent, but becauſe otherwiſe will follow Incongruity: For *penetrans* agrees well with *vulnus*, and not with *pelletto*, for that is the Ablative Caſe, and ſo cannot be *penetrans*, for then it ſhould be *penetrante*: And it was ſaid, that the Wound did not penetrate or pierce the Body, but the Pellet pierced the Body, and made the Wound; but it was not allowed, for the Senſe is ſignificant enough to ſay that the Wound pierced the Body; for if the Depth of the Wound ſhould be asked, it might well be anſwer. that it pierced the Body. And *penetro derivat' a penitus & intro.* And ſo the Words are ſignificant enough, without any Abſurdity or Incongruity, to ſay *dans, &c. vulnus mortale totaliter penetrans, in & per corpus, & eo magis*, being the Words of Lay-people. For the Pellet gave the Wound, which Wound did pierce through the whole Body. But the great Objection, and moſt difficult againſt the Indictment was, becauſe the Indictment wanted *percuſſit*; for the Effect of it, as to this Purpoſe is, *Præd'* H. D. *quoddam tormentum, &c. cum pulvere & pelletto plumbeo onerat', &c. in & ſuper ipſum* Henr' Long *exoneravit, dans eidem* Henrico Long *adtunc & ibidem cum pellet' plumbeo præd' extra torment' præd' per ipſum dimiſſo unum vulnus mortale, &c.* And it was ſaid, that although *percuſſit* is wanting, yet here is tantamount, and it is a Rule of Law and Reaſon, *Non refert quid ex æqui pollentib' fiat.* And when it appears that *H. D. torment' cum pulv' & pelletto, &c. in ipſ.* H. L. *exonerav. dans eidem*

The 4th Object. anſwered. *4 Co. 42. a. Godb. 65, 66. Stanf. Cor. 79. a. 2 Jac. 318.

4 Co. 42. a.

The 5th Object.

The 5th Object. anſwered.

The 6th Object.

Cr. Jac. 635.

eidem Henr' Long, &c. *cum pellet' plumbeo præd'. &c. unum vulnus mortale*, &c. by that it appears to the Court, that *H. D.* was the Occaſion of the Wound, and on the Matter gave (in this Manner) the Wound. And it was ſaid, that *percuſſit* is not properly ſaid, but when one with his Hand, or with ſome Weapon which he holds in his Hand, wounds another, and not when he gives a Wound by a Means, as out of a Gun with a Bullet, or out of a Bow with an Arrow. This Word *Percutio* is derived and compounded as it was ſaid from *per* and *quatio:* But it was reſolved by the whole Court, that for this Cauſe the Indictment was inſufficient. And this Part of the Indictment concerning the ſaid Objection was divided into 2 Parts: 1. The Clauſe before *dans eidem*, &c. and the Clauſe containing *dans eidem*, &c. And it was reſolved that the firſt Clauſe was not ſufficient of it ſelf, for although *H. D.* diſcharged the Dagge upon him, yet it may be he was not ſtruck by it; then the ſecond Clauſe, *ſcil. dans eidem*, &c. cannot make it good, for the Clauſe of *dans*, &c. depends on the ſaid firſt Clauſe, and deſcribes only the Wound, to manifeſt it to be mortal; which ought to appear by the firſt Sentence to be given, becauſe *in hoc caſu participium determinat verbum:* But here it doth not appear by the firſt Clauſe that there was a Stroke given; and then *dans*, &c. cannot ſupply it; for that is a Participle depending upon the Verb precedent, and the Verb precedent is *exoneravit*, and *exoneravit* may be without Stroke: As if one be indicted that he did aſſault another with an Ax in his Right Hand, giving him a mortal Wound, it is inſufficient, becauſe this Participle (giving) has no Verb before with which it can participate: And it was ſaid, that if the ſecond Clauſe had been in the Caſe at Bar, *& dedit adtunc & ibidem unum vulnus mortale*, it had been inſufficient; for *dedit* doth not imply a violent and voluntary Stroke, as *percuſſit*, and if *dedit* would have been ſufficient, yet *dans* by the whole Court for the Cauſe aforeſaid was inſufficient. And it was reſolved the Indictment might ſay *percuſſit*, as well of a Wound given out of a Gun, or Bow, as with the Hand. And a Precedent in 10 *E.* 4. in the King's Bench was ſhewed, where the Wound was out of a Gun, and the Indictment had the Word *percuſſit*, 1 *Ma. Dier* 99. That an Indictment that ſuch a Perſon *ex malitia ſua præcogitata felonice murdravit*, &c. is not good without ſaying *percuſſit*, becauſe an Indictment of Murder and Manſlaughter ought to have expreſly a Stroke to be ſuppoſed. And true it is, that in all Indictments of Murder, or

Palm. 282. Cr. Jac. 635.

Cr. Jac. 635. Palm. 282. Dyer 99. pl. 63. 1 Bulſtr. 144.

Manſlaughter a Stroke ought to be alledged, unleſs in Caſe of Poiſoning. And for this laſt Error the Outlawry was reverſed, and the ſaid *H. D.* diſcharged and there are many Preeedents of Indictments of Death, where the Wound was given with a Bullet out of a Gun, or by an Arrow out of a Bow, and all thoſe (which I ſaw) had this Word *percuſſit*. 4 Co. 44. a. b.

Paſch. 3 Jac.

In the Common Pleas.

SAFFYN's *Caſe.*

Cr. Jac. 60, 61. Lit. Rep. 18. Cart. 196.

IN Replevin between *Saffyn* Plaintiff, and *Adams* Defendant, which began *Trin.* 44. *Eliz. Rot.* 1242. on a ſpecial Verdict found, the Caſe was ſuch; A Man made a Leaſe for Years of certain Land to begin after the End or Determination of a Term for Years then in Being; the firſt Years determined, the ſecond Leſſee did not enter, but he in the Reverſion entered and made a Feoffment, and levied a Fine of the Land with Proclamations, according to the Statute of 4 *H.* 7. *cap.* 24. And five Years paſt after the Proclamations without Entry or Claim made by the ſecond Leſſee: And whether the Leſſee for Years was barred or not by the ſaid Fine with Proclamations, and the ſaid Act of 4 *H.* 7. was the Queſtion; and it was objected that the Leſſee for Years ſhould not be barred for two Cauſes:

(*a*) 9 Co. 103. a.

1. Although the (*a*) Word *(Intereſt)* is in the ſaid Act, yet it is to be intended of ſuch Intereſt that the Owner thereof, may thereof levy a Fine; but he who has a Leaſe or Intereſt for Years cannot levy a Fine, but every one ſhall ſay againſt it, *quod partes finis nihil habuerunt*, becauſe a Leaſe for Years is but a Chattel, and a Fine is in the Realty, and the Law requires that one of the Parties have a Freehold. And that this Word *(Intereſt)* in the Act ſhall be intended of an Intereſt of Freehold whereof a Fine may be levied. And it was ſaid that *Mich.* 21 *Eliz.* in the King's Bench, it was adjudged in (*b*) *Saunder's* Caſe, That a Leaſe for Years was not an Intereſt within the ſaid Statute of 4 *H.* 7.

(*b*) Goldsb. 171, 172. Cr. Jac. 60, 61. Cart. 82. 1 Leon. 99. 2 Leon. 157. Raym. 149. Poſtea 124. b.

2. It was objected, That although Leſſee for Years, when he is ouſted and ejected ſhall be within the ſaid Act; yet in this Caſe the Leſſee ſhall not be bound, for no Fine levied with Proclamations ſhall bind any, but thoſe who are put out of Poſſeſſion, and have but a Right, for

for if their Eſtate or Intereſt be not deveſted out of them, but remain in them as it was *ab initio*, they need not make an Entry or Claim to that which never was deveſted; and therefore it is agreed in *Plow. Com.* 373. in *Stowel*'s Caſe, That a Fine levied of Land with Proclamations, and five Years paſt without (*a*) Claim made by him who has Common of Paſture, Rent, or the like, ſhall not bind them, for their Eſtate is not deveſted out of them, but always remains in them. So it was ſaid in the Caſe at Bar, until the ſecond Leſſee enters he has but *Intereſſe termini*, as he had before the firſt Leaſe determined, which (as it was ſaid) continues in him notwithſtanding the Feoffment or Fine. As if a Man makes a Leaſe for Years to begin at a Day to come, and before the Day the Leſſor is diſſeiſed, yet the Leſſee may grant over his Intereſt, for ſuch *Intereſſe termini* cannot by Diſſeiſin or Feoffment be deveſted, and put to a Right, more than a Rent or Common or the like; and this was briefly the Effect of what was ſaid on this Side. But it was reſolved, That the (*b*) Fine and Proclamations, and the Nonclaim of the Leſſee had barred him of his Term by the Act of 4 *H.* 7. And as to the firſt Objection it was anſwered and reſolved, that notwithſtanding a Leſſee for Years has not ſuch Eſtate that he can levy a Fine yet *non ſequitur*, that his Term and Intereſt ſhall not be bound and barred by the ſaid Statute, and that for 2 Reaſons: 1. It is within the Letter of the Act, for the Words of the Act are general (*the ſaid Fine with Proclamation ſhall be a final End, and conclude as well Privies as Strangers to the ſame*) which Words are general, and extend to all: And the Words of the Saving are (*ſuch Right, Claim, and Intereſt, &c.*) and he who has a Term for Years has an Intereſt, and therewith agrees (*c*) *Catlyn* in *Plow. Com.* 373. 2. It is within the Miſchief; for it appears by the Preamble, (*That Fines ought to be of the greateſt Strength to avoid Strifes and Debates, and to be* (*d*) *the final End and Concluſion, &c.*) And great Miſchief, Trouble and Vexation will enſue, if Leaſes for Years which now are made for a great Number of Years, ſometimes abſolute, ſometimes determinable on Lives, ſhall not be within the ſaid Act; and therefore it was reſolved, That the Intereſts of Tenant by Statute Merchant, (*e*) Statute Staple, Elegit, Guardian by Knight's Service, Executors who have Lands till Debts and Legacies are paid, and every other ſuch Intereſt are within the ſaid Act of 4 *H.* 7. for all theſe have Intereſt in the Land, and he who has a bare Right or Title to any Inheritance or Freehold, cannot levy a Fine to any Stranger, but it ſhall be ſaid, *qd' partes finis nihil habuer'*; and yet he ſhall be bound by a Fine levied by the Ter-tenant: So although Leſſee for Years cannot levy a Fine to any Stranger

(*a*) Cr. Jac. 60. Raym. 149.

(*b*) 1 Sid. 459. Cr. Jac. 60, 61. Cart. 82. 1 Vent. 156. 2 Inſt. 517. 9 Co. 105. a. 2 Rol. Rep. 402, 405. 3 Keb. 288. Plowd. 374. a. Noy 23. Hardr. 400, 413, Co. Lit. 262. a.

7 Co. 32.

(*c*) Plow. 374. a

(*d*) 9 Co. 105.

(*e*) 2 Inſt. 515 Plowd. 374. a. Mod Rep. 2 [illegible]

but it ſhall be ſaid, *quod partes finis nihil habuerunt*, yet *non ſequitur* but that he ſhall be bound by the Fine with Proclamations levied by the Tenant of the Land.

As to the ſecond Objection it was anſwered, and reſolved by the Court, that in the Caſe at Bar by the ſaid Feoffment, the ſecond Leſſee had but a Right, for when his future Intereſt had Commencement, then he had ſuch preſent Eſtate in the Land which might be deveſted, and which he might reveſt by his Entry. As if a Man makes a Leaſe for Years, in this Caſe before the Leſſee enters he has an Eſtate for Years in the Land which he may (*a*) grant. And the Words of *Littleton* were well obſerved, *lib.* 1. *c.* 7. *fol.* 13. *b.* If a Man makes a Leaſe for Years, and before the Leſſee enters the Leſſor dies, yet the Leſſee may (*b*) enter, becauſe the Leſſee by Force of the Leaſe has a preſent Right to have the Tenements according to the Form of the Leaſe. And *Lit. lib.* 3. *cap.* 8. *fol.* 107. If a Man leaſes his Land for Years, if the Leſſor releaſes to the Leſſee all his Right before the Leſſee has entered into the Land, ſuch (*c*) Releaſe is void, becauſe the Leſſee had not Poſſeſſion in the Land at the Time of the Releaſe made, but only a Right to have the ſame Land by Force of the ſame Leaſe: And *eodem lib. fol.* 127. if a Man leaſes Tenements for Years, by Force of which the Leſſee is ſeiſed, that is, poſſeſſed, and afterwards the Leſſor by his Deed grants the Reverſion to another for Life, *&c.* it is neceſſary in ſuch Caſe that the Tenant for Term of Years (*d*) attorn: By which it appears, that before the Leſſee enters, he has not actual Poſſeſſion, nor (as it ſeems) the Leſſor has not ſuch a Reverſion that he can grant it over by the Name of the (*e*) Reverſion, but yet ſuch Leſſee has more than he who has a future Intereſt, for he may preſently enter and take the Profits, ſo that his Intereſt accompanied with preſent Entry and Ability to take the Profits which he may transfer to another, may be deveſted out of him, and put to a meer Right not grantable: And ſo the Difference appears between the Caſe at Bar, and (*f*) *Saunder*'s Caſe which was adjudged in 21 *Eliz.* for there at the Time of the Fine levied the Leſſee had not Power to enter or take the Profit, but only a future Intereſt, which (if it could be deveſted) he had not any Means poſſible to reveſt in him again.

(*a*) Cr. Jac. 60. Cr. El. 15, 127.

(*b*) Lit. Sect. 66. Co. Lit. 51. b.

(*c*) Lit. Sect. 459. Hetl. 81. Co. Lit. 46. b. 270. a. Lit. 108. b. Perk. Sect. 603.

(*d*) Co. Lit 315. b. Lit. Sect. 567. Lit. 128. b.

(*e*) Cr. Car. 110, 400 Cr. Jac. 604. Godb. 451. 10 Co. 107. b.

(*f*) Goldsb. 171, 172. Cr. Jac. 60. 61. Cart. 82. 3 Leon. 157. 3 Leon. 99.

Paſch.

Paſch. 3 Jacobi.

De Libellis famoſis.

IN the Caſe of *L. P.* in the *Star-Chamber* this Term, againſt whom the Attorney General proceeded *ore tenus* on his own Confeſſion, for compoſing and publiſhing an infamous Libel in Verſe, by which *John* Archbiſhop of *Canterbury* (who was a Prelate of ſingular Piety, Gravity, and Learning, now dead) by Deſcriptions and Circumlocutions, and not in expreſs Terms; and *Richard* Biſhop of *Canterbury* who now is, were traduced and ſcandalized: In which theſe Points were reſolved: 3 Inſt. 174. 9 Co. 53. b. Moor 813, 627. March. ſur Slander 131, 132.

1. Every Libel which is called *famoſus Libellus, ſeu infamatoria ſcriptura,*) is made either againſt a private Man, or againſt a Magiſtrate or publick Perſon. If it be againſt a private Man it deſerves a ſevere Puniſhment, for although the Libel be made againſt one, yet it incites all thoſe of the ſame Family, Kindred, or Society to revenge, and ſo tends *per conſequens* to Quarrels, and Breach of the Peace, and may be the Cauſe of Shedding of Blood, and of great Inconvenience: If it be againſt a Magiſtrate, or other publick Perſon it is a greater Offence; for it concerns not only the Breach of the Peace, but alſo the Scandal of Government; for what greater Scandal of Government can there be than to have corrupt or wicked Magiſtrates to be appointed and conſtituted by the King to govern his Subjects under him? And greater Imputation to the State cannot be, than to ſuffer ſuch corrupt Men to ſit in the ſacred Seat of Juſtice, or to have any meddling in or concerning the Adminiſtration of Juſtice.

2. Although the private Man or Magiſtrate be dead at the Time of the Making of the Libel, yet it is puniſhable, for in the one Caſe it ſtirs up others of the ſame Family, Blood, or Society to revenge, and to break the Peace, and in the other the Libeller traduces and ſlanders the State and Government, which dies not. 3 Inſt. 174.

3. A Libeller (who is called *famoſus defamator*) ſhall be puniſhed either by Indictment at the Common Law, or by Bill, if he deny it, or *ore tenus* on his Confeſſion,

ſion, in the *Star-Chamber*, and according to the Quality of the Offence he may be puniſhed by Fine or Impriſonment, and if the Caſe be exorbitant, by Pillory and Loſs of his Ears.

4. It is not material whether the Libel be true, or whether the Party againſt whom it is made, be of a good or ill Fame; for in a ſettled State of Government the Party grieved ought to complain for every Injury done him in an ordinary Courſe of Law, and not by any Means to revenge himſelf, either by the odious Courſe of Libelling, or otherwiſe: He who kills a Man with his Sword in Fight is a great Offender, but he is a greater Offender who poiſons another, for in the one Caſe he who is openly aſſaulted, may defend himſelf, and knows his Adverſary, and may endeavour to prevent it: But poiſoning may be done ſo ſecretly that none can defend himſelf againſt it, for which Cauſe the Offence is the more dangerous, becauſe the Offender cannot eaſily be known; and of ſuch Nature is libelling, it is ſecret, and robs a Man of his good Name, which ought to be more precious to him than his Life, *& difficillimum eſt invenire Authorem infamatoriæ ſcripturæ*, and therefore when the Offender is known, he ought to be ſeverely puniſhed. Every infamous Libel, *aut eſt in ſcriptis*, *aut ſine ſcriptis*; A ſcandalous Libel *in ſcriptis* is, when an Epigram, Rhime, or other Writing is compoſed or publiſhed to the Scandal or Contumely of another, by which his Fame or Dignity may be prejudiced. And ſuch Libel may be publiſhed, 1. *Verbis aut cantilenis:* As where it is maliciouſly repeated or ſung in the Preſence of others. 2. *Traditione*, when the Libel, or any Copy of it is delivered over to ſcandalize the Party; *Famoſus Libellus ſine ſcriptis* may be, 1. *Picturis*, as to paint the Party in any ſhameful and ignominious Manner. 2. *Signis*, as to fix a Gallows, or other reproachful and ignominious Signs at the Party's Door or elſewhere. And it was reſolved *Mich.* 43 & 44 *Eliz.* in the *Star-Chamber* in *Halliwood*'s Caſe, That if one finds a Libel (and would keep himſelf out of Danger) if it be compoſed againſt a private Man, the Finder either may burn it, or preſently deliver it to a Magiſtrate: But if it concern a Magiſtrate, or other publick Perſon, the Finder ought preſently to deliver it to a Magiſtrate, to the Intent that by Examination and Induſtry, the Author may be found out and puniſhed. And Libelling and Calumniation is an Offence againſt the Law of God. For *Leviticus* 17. *Non facias calumniam proximo.* Exod. 22. ver. 28. *Principi populi tui non maledices.* Eccleſiaſtes 10. *In cogitatione tua*

Hob. 253.

3 Inſt. 174.
9 Co. 59. b.

Hob. 253.
9 Co. 59. b.

tua ne detrahas Regi, nec in secreto cubiculi tui diviti maledices, quia volucres cœli portabunt vocem tuam, & qui habet pennas annuntiabit sententiam. Psal. 68. 13. *Adversus me loquebantur qui sedebant in porta, & in me psallebant qui bibebant vinum.* Job 30. ver. 7 & 8. *Filii stultorum & ignobilium, & in terra penitus non parentes, nunc in eorum canticum versus sum, & factus sum eis in proverbium.* And it was observed, that *Job* who was the Mirrour of Patience, as appears by his Words, became *quodammodo* impatient when Libels were made of him; and therefore it appears of what Force they are to provoke Impatience and Contention. And there are certain Marks by which a Libeller may be known: *Quia tria sequuntur defamatorem famosum:* 1. *Pravitatis incrementum*, Increase of Lewdness: 2. *Bursæ decrementum*, Decrease of Money, and Beggary; 3. *Conscientiæ detrimentum*, Shipwrack of Conscience.

Pasch,

Paſch. 3 Jacobi,

In the King's Bench.

PALMER's *Caſe.*

(a) Cr. Jac. 66. Yelv. 59. 6 Co. 70. b.

BEtween *(a) Palmer* and *Wilder* for a Ward in the County of *Oxf.* the only Queſtion in the Caſe was; If the Guardian in Chivalry, ſhall have the ſingle Value of the Heir without any Tender: And it was objected, that the Guardian ſhould not have it without a Tender for four Reaſons.

1. *Litt. lib.* 2. *cap.* 4. *fol.* 21. and all the Books agree, that Knights Service draws to it Ward, Marriage, and Relief; and the Stat. of *Merton, (b) cap.* 7. ſaith, *Quod maritagium ejus qui infra ætatem eſt de mero jure pertinet ad Dominum feodi*, ſo that the Marriage of the Heir within Age doth belong by the Law in ſuch Caſe to the Lord; Then if the Heir will perform that which the Law requires, *ſcil.* to be married by his Guardian, there is no Reaſon that he ſhould render any Value for it; for *Littleton* doth not ſay, that Knights Service draws to it the Value of the Marriage, but the Marriage it ſelf; and the Statute of *Merton* doth not ſay, *Quod valor maritagii ejus de mero jure pertinet ad Dominum feodi, ſed maritagium ejus de mero jure pertinet, &c.* Suppoſe then that *A.* covenants with *B.* that *B.* ſhall have the Marriage of *A.* and that he will be married to her whom *B.* will nominate to him; In this Caſe if *A.* be ready to be married according to his Covenant, and *B.* will not nominate any, he ſhall never render any Value for it: So in the Caſe at Bar, foraſmuch as the Law gives the Lord the Marriage, if the Heir be ready to perform it, he is excuſed, and ſhall not be charged with any Value. So if the Tenant be ready to do Homage, or any other corporal Service, which by his Tenure he ought to do, the Lord cannot refuſe or waive it, and take amends for it.

(b) 2 Inſt. 92, 93, &c. Cr. El. 469.

2. In

2. In this Case of Marriage which the Law gives, the Lord is to have the Benefit, and he ought to do the first Act, for the Heir cannot perform the Duty which the Law in such Case requires, without the first Act done by the Lord, *scil.* Tender of a Woman that the Heir shall marry; and in all Cases when the Default is in him who ought to do the first Act, the other Party is excused. As if a Man be bound to levy a *(a)* Fine to the Obligee before such a Day; in this Case forasmuch as by the Law the Obligee ought to do the first Act, *scil.* to sue forth a Writ of Covenant before the Day, if no Writ of Covenant be sued, the Obligor is excused, as it is held 4 *E.* 3. 39. *b.* 18 *E.* 3. 27. *b.* & 11 *H.* 4. 18. *a.* *Vide* 21 *E.* 4. 2. 2 *E.* 4. 3, 4. 20 *Eliz.* 361. *Dyer*, *Windsor*'s Case, and 22 *Eliz.* *Dyer* 371, &c.

(a) 1 Rol. 458. Hutt. 48. Winch. 29. 8 E. 4. 2. b. 21. b.

3. The Words of the Writ *de valore maritagii* are, *Quare cum (b) maritagium præd'* B. *ad ipsum* A. *pertineat, eo quod præd'* B. *terram suam de eo tenuit per servitium militare, & idem* A. *præd'* B. *dum fuit infra Statem in custodia sua, competens maritagium absque disparagatione, &c. sæpius obtulerit idem* B. *maritagium illud renuens, de eodem maritagio præfat'* A. *cum ad plenam ætatem pervenerit satisfacere recusavit, & adhuc recusat minus juste, &c. ad dampnum, &c.* By which Writ, and also by the Writ of Intrusion of Ward it appears, that the Lord shall not have the Value without Tender of Marriage, and Default in the Heir; and if the Tender in such Case should not be requisite, great and tedious Surplusage would be contained in the Writ, which of its Nature, and according to its Name, ought to be brief and substantial; *Dicitur enim breve, quia rem breviter enarrat.*

(b) Dyer 361. pl. 9. F. N. B. 141. d.

4. Upon the Reasons aforesaid are divers express Authorities in the Point, 21 *E.* 4. 43. *a.* *per totam Curiam*, that it ought to be tender'd, *F. N. B.* 141. *(c)* 40 *E.* 3. 6. *b.* Issue taken on the Tender, 11 *H.* 4. 82. Tender alledged, *(d)* 43 *E.* 3. 20. and the Statute of *Merton*, *cap.* 7. *Si quis hæres, &c. pro Domino suo noluerit maritare, non compellatur hoc facere, sed cum ad ætatem pervenerit det Domino suo & satisfaciat ei, &c.* all which prove that there ought to be a Tender. As to the first and second Objections, it was resolved *(e) per totam Curiam*, That at the Common Law it was at the Lord's Election to have the Marriage of the Heir, or to suffer the Heir to marry whom he pleased, and to have Recompence, *scil.* the Value of it, and that at the Common Law lay not only the Writ *De valore maritagii*, but also the Writ *Quare se intrusit maritagio non satisfacto*, and therewith agrees *(f)* 31 *Ass. p.* 26. And at the Common Law if the Heir within Age had been ravished and married, the Guardian should recover in an Action of Trespass the Value of the Marriage in Damages, and therewith agrees 29 *E.* 3. 37. & 29 *Ass.* which is a notable

(c) Fitz. Action sur le Stat. 9. Br. Forfeiture de Marriage 3.

(d) Fitz. Action sur le Stat. 10. Br. Forfeiture de Marriage 5.

Le Resolution del Court.

(e) 6 Co. 70. b. Cr. Jac. 66, 151.

(f) Br. Forfeiture de Marriage 7. Br. Tender 44.

notable Proof, that the Value of the Marriage belongs to the Lord without Tender; (*a*) for if the Value ſhould not be due without Tender, then if the Raviſher of a Ward married him, the Lord ſhould not receive the Value, or if the Heir married himſelf before the Lord could make a Tender, or if he went beyond (*b*) Sea, or to Places unknown, the Act and Wrong of the Heir if a Tender were neceſſary might prevent the Guardian of the Benefit of the Marriage, which *de* (*c*) *mero jure* belongs to him, which would be inconvenient. As to the third Exception it was anſwered, That many Times Writs are framed according to that which moſt uſually happens. And where the Rule is, *ad* (*d*) *ea quæ frequentius accidunt jura adaptant*'; it may be well ſaid, *ad ea quæ frequentius accidunt reſcripta ſive brevia adaptant*'; And a ſpecial Caſe ſhall have the uſual Writ and a ſpecial Count: As to the Authorities, *ſcil.* of 40 *E.* 3. 6. *b.* there it appears that the Iſſue was taken on the Tender, which many Times is done by good Advice, *ſcil.* firſt to try the Matter in Fact, if the Plaintiff's Counſel will admit it, and then to take Advantage of the Matter in Law, which joining of Iſſue by the Plaintiff's Counſel, is not any Authority to Prove that a Tender is requiſite. And as to the Book of (*f*) 21 *E.* 4. 43. *a.* which is but an Opinion *obiter* without Argument or Deliberation, in the debating of another Caſe, is to be underſtood of the Forfeiture of Marriage; And in the other Books, Tender is only alledged, and no Authority that is requiſite: But the Book of (*g*) 31 *Aſſ. p.* 26. is adjudged, That for the ſingle Value a Tender is not requiſite; and therewith agrees 2 *H.* 7. 9. *a.* *Et hoc communi juris peritorum calculo comprobatur*: And ſo the Doubt in 9 *Eliz. Dyer* 255. (*h*) well reſolved.

(*a*) Cr. El. 335. 468, 469. Yelv. 59. Moor 22, 65, 593. Co. Lit. 82. a. 6 Co. 70. b. 71. a. 2 Inſt. 93. Cr. Jac. 66. Cr. Car. 103, 503.

(*b*) Yelv. 59. 6 Co. 71. b. Cr. Jac. 151.

(*c*) Cr. Jac. 66, 151. Yelv. 59. 6 Co. 71. b. Cr. El. 468.

(*d*) 6 Co. 77. a. 7 Co. 28. a. Calvin's Caſe. Co. Lit. 238. a. 2 Inſt. 137. Cart 13.

(*e*) Antea 127. a. Fitz. Action ſur le Statute 9. Br. Forfeiture de Marriage 3.

(*f*) Ant. 127. a.

(*g*) Antea 127. a. Br. Forfeiture de Marriage 7. Br. Tender 44.

(*h*) Dyer 255. pl. 6. Doct. pl. 94.

In Annis, in quibus Casus isti adjudicati erant, hi fuerunt Justiciarii.

Justic' de Banco Regis.

CHrist. Wray Miles, qui obiit anno 34 Eliz. Et post eum, Johannes Popham Miles.
Johannes Southcote.
Thomas Gawdy Miles.
Willielmus Ayloffe.
Robertus Shute.
Johannes Clench.
Franciscus Gawdy Miles.
Edwardus Fenner Miles.
Christoph. Yelverton Miles.
David Williams Miles.

Justic' de Communi Banco.

JAcobus Dyer Miles, qui obiit post Hill' 24 Eliz. Et Pasch. 24. Edmundus Anderson Miles.
Ann' 19 Eliz. Rog. Manwood, qui recessit in Scacc' Hill. 24 Eliz.
* Robertus Munson, cessit Pasc. 22.
Hill' 20 Eliz. Thomas Meade, obiit Pasc. 27 Eliz.
Trin' 21 Eliz. Franciscus Windham, obiit post Trin. 34 Eliz.
Hill' 23 Eliz. Will' Periam, Hill' 35. recessit in Scaccario.
M. 27. & 28. El. Franciscus Rode, obiit an' 31 Eliz.
Pasch. 31 Eliz. Thomas Walmesley Miles.
Hill' 35 Eliz. Franciscus Beamont, obiit ante Pasc. 40 Eliz.
Hill' 36 Eliz. Thomas Owen, obiit ante Hill' 41 Eliz.
Trin' 40 Eliz. Johannes Glanvil, obiit post Trin' 42 Eliz.
Hill' 41 Eliz. Georgius Kingesmill Miles.
Mich. 43. Eliz. Petrus Warberton Miles.
Hill' 1 Ja. Reg. Willielmus Daniel Miles.

Baron' in Scaccario.

JOh. Jeffrey Miles.
T. Fleming Miles.
Robertus Shute.
Johannes Clench.
Edw. Flowerdew.
Rob. Clark Miles.
Thomas Gent.
Matthæus Evans.
Joh. Savill Miles.
Georg. Snig Miles.
Johan' Sotherton.

Servientes ad Legem.

ROb. Gardiner Miles.
Tho. Harris Miles.
Rich. Lewkenor Miles.
Johannes Hele Miles.
Edw. Herne Miles.
Edm. Pelham Miles.
Edw. Philips Miles.
Joh. Crook Miles.
Johannes Sherley.
Tho. Coventry.
Edw. Houghton.
Laur. Tanfield Mil'.
Tho. Foster. Miles.
Thomas Harris.
Jacobus Altham.
H. Hubberd Mil'.
August' Nichols.
Robert' Barker.
Rich. Hutton.
Jacob. Lea Miles.
Joh. Dodderidge.

ſuum iſtius Libri ſeries; continen' in qua Cur' act' & quando recordat' fuer', & in quo folio hujus Libri incipiunt.

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FINIS.